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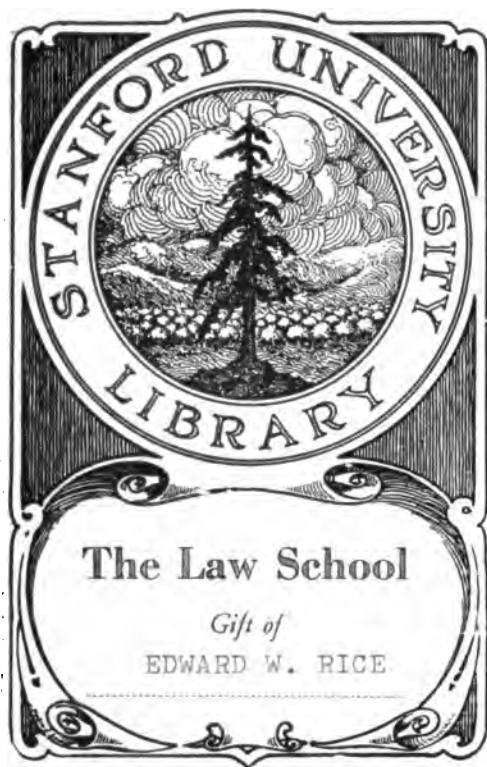
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List
P. 12

TREATISE
ON THE
LAW OF EVIDENCE.

Eighth Edition.
WITH CONSIDERABLE ADDITIONS.

BY S. MARCH PHILLIPPS, ESQ.

AND

ANDREW AMOS, ESQ.

BARRISTER AT LAW.

PART II.

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PART THE SECOND.

ON WRITTEN EVIDENCE.

WRITINGS are either public or private. Some public writings are of record ; others, not of record. Again, public writings may be distinguished into such as are of a judicial character, and such as are not judicial. It is proposed to treat, in the first chapter, of the admissibility and effect in evidence of judicial writings ; and, in the second, of the effect of such public writings as are not judicial. The subsequent chapters will relate to the proof of writings, both public and private.

CHAPTER THE FIRST.

OF THE ADMISSIBILITY AND EFFECT IN EVIDENCE OF JUDICIAL WRITINGS.

IT is proposed to consider the subject in the following order :

First—With respect to verdicts and judgments, in the superior Courts.

Secondly—Verdicts and judgments in inferior Courts.

Thirdly—Sentences of foreign Courts.

Fourthly—Proceedings in the Ecclesiastical Courts.

Fifthly—Proceedings in other Courts of exclusive jurisdiction.

Sixthly—Proceedings in the Court of Chancery.

Seventhly—On depositions.

Lastly—On inquisitions.

It is to be observed, that these several heads of the subject mutually illustrate each other, and that the general principles applicable to each cannot be sufficiently comprehended without reference to all.

SECTION I.

On the Admissibility and Effect in Evidence of Judgments and Verdicts in the Superior Courts.

Conclusive of
fact recorded.

Judgments and verdicts in the superior Courts are always of record. They have, therefore, the character which belongs to all records, that no evidence is allowed to contradict them. (1) Thus, if a verdict finding several issues were to be produced in evidence, the opposite party would not be allowed to shew, that no evidence was offered on one of the issues, and was indorsed on the *postea* by mistake. (2) On an indictment for assisting the escape of a convict out of prison, if the record of the conviction is produced by the proper officer, evidence is not admissible to dispute the statement in the record, or to shew that it never was filed among the other records of the county; even though the indictment refer to it with a *prout patet* as remaining among those records. (3) An officer who has the care and custody of records may be examined as to their condition, but he cannot be examined as to their matter or contents. (4)

Immaterial
averments.

But a record will not be conclusive as to the truth of allegations, which were not material nor traversable. (5) Thus, for example, a party will not be estopped from averring, in an action of debt on a bond, that the bond was made at A., though, in a

(1) Co. Litt. 1176; 260, a.; 12 Rep. 24, 25; Dodderidge's English Lawyer, p. 200; Lamb. Inst. B. 1, c. 13, p. 71; Gilb. Ev. 5; B. N. P. 221. Glynn v Thorpe, 1 B. & A. 156. Rex v. Hopper, 3 Price, 495. The authorities principally relate to records, but the principle and the law extends to some Courts, at

least, which are not, strictly speaking, Courts of Record.

(2) Reed v. Jackson, 1 East, 355.

(3) Rex v. Shaw, and others, 1 R. & R. Cr. Ca. 526.

(4) Leighton v. Leighton, 1 Str. 210.

(5) Co. Litt. 352 b.

former action on the same bond, he averred it to have been made at B. (1) So, in the case of a conviction for a felony, where the jury had given a general verdict, the record will not be conclusive that the offence was committed on the day mentioned in the indictment, for the time is not of the substance of the charge; and therefore a party interested to dispute the forfeiture, (which in the case of real property relates to the time of the offence), may show that the offence was committed on a different day from that alleged in the record. (2)

The record of a judgment or verdict not being liable to contradiction as to the truth of its contents, the question as to its admissibility or effect in evidence must depend on the inferences attempted to be drawn from it. These inferences are sometimes necessary and conclusive, and sometimes optional with juries. Where a judgment is produced merely for the purpose of shewing that such a proceeding actually took place, (as, with a view to disqualify a witness, by shewing that judgment was actually passed upon him), the record is conclusive of the fact of conviction; the fact of conviction being by the law made the criterion of incompetency. (3)

Judgment how used.

To prove fact of judgment.

A judgment may be used for the purpose of shewing, that a person has already obtained satisfaction, or has failed in an attempt to obtain satisfaction for what he is claiming. In such cases the judgment is conclusive, at least, if pleaded by way of estoppel, as to what it clearly purports to decide; but evidence is sometimes admissible in regard to the connection between the judgment and the particular claim, as, where, in answer to a plea of judgment recovered, the plaintiff replies, that it did

To shew complaint determined.

(1) Com. Dig. Estoppel, E. 6.

(2) *Ives's case*, 3 Inst. 230; *Gilb. Ev.* 230.

(3) The legal consequences arising from the simple fact of a judgment having been passed are very numerous, *e. g.* as constituting part of a title; to shew a suit determined; to let in evidence of what was sworn upon a trial; to justify proceedings in execution of

the judgment; to entitle a partner to contribution. In *Green v. N. R. Co.* 4 T. R. 590, the judgment was used to prove a fact, *viz.* what a party had been by process of law compelled to pay. Judgments have sometimes the effect of changing property, *Adams v. Broughton*, 2 Str. 1078; *Morris v. Robinson*, 3 B. & C. 206.

not relate to the same matters as the action in which it is pleaded.

Thus, where the plaintiff in a former action declared on a promissory note and for goods sold, but, upon executing a writ of inquiry after judgment by default, gave no evidence on the count for goods sold, the judgment was not a bar to his recovering for the goods in another action. (1) But if the plaintiff had given any evidence at all on the count for goods sold, and the judgment had included this with the rest of the plaintiff's demand, the judgment might then have been pleaded as a judgment recovered upon the same identical causes of action. For if a plaintiff, having several causes of action against a defendant on a trial, offers evidence of these causes, and fails for want of sufficient evidence to establish some of them, he cannot bring another suit for those causes of action in which he has failed. (2)

A plaintiff, having a claim against the defendant for rent, and also for stone taken from a quarry, declared in debt, and for use and occupation, with a count for money had and received, and by the particulars it appeared that the plaintiffsought to recover a stated sum for the value of certain described

(1) *Seddon v. Tutop*, 6 T. R. 607. If the plaintiff fails to recover all that he is entitled to, for want of sufficient proof on the first trial, he should move to set aside the verdict he has obtained, per Best, Ch. J., in *Stafford v. Clark*, 2 Bing. 382. *Hall v. Stone*, 1 Str. 515. *Markham v. Middleton*, 2 Str. 1259. The like principle, as in *Seddon v. Tutop*, has been applied to awards of all matters in difference, *Ravee v. Farmer*, 4 T. R. 146. *Thorpe v. Cooper*, 5 Bing. 129. But in other authorities it has been considered, that where all matters in difference are referred, the party ought to come forward with his whole case, *Dunn v. Murray*, 9 B. & C. 788. *Smith v.*

Johnson, 15 East, 213.

(2) Per Best, Ch. J., in *Stafford v. Clark*, 2 Bing. 382. Where a plaintiff, knowing that he has a claim upon an account for a greater amount, elects to sue for less in an inferior Court, it was said to be the same, as if a plaintiff at *Nisi Prius* had a demand of 60*l.*, consisting of three sums of 20*l.*, and consented to take a verdict for 40*l.*, he could not afterwards bring a second action for 20*l.*, *Lord Bagot v. Williams*, 3 B. & C. 235. *A nolle prosequi*, as to part of a sum recovered, entered up after judgment for the whole, is a bar to any future action for the same cause, *Bowden v. Horne*, 7 Bing. 716.

quantities of stone : before the trial, the plaintiff commenced another action against the defendant for improperly quarrying stone, with a count in trover for stone, and delivered particulars, claiming the same sum as before for similar quantities of stone : at the first trial the plaintiff confined his evidence to the claim for rent, and recovered a general verdict : at the second trial he had a verdict for the stone taken away. It was held, that the plaintiff having distinct demands against the defendant, one of which was not advanced by him at the trial of the first action, the tort was not thereby waived, and consequently that the second action was not barred by any former recovery. (1)

Explanatory evidence of this nature is required, when a former recovery has been obtained by a suit in a different form. One great criterion for trying whether the matter or cause of action be the same, is, that the same evidence would sustain both actions. Thus, a judgment for a defendant in trespass, when the right of property is determined, is a bar in trover for the same taking. (2) So a verdict for the defendant in trover is a bar in an action of money had and received for the money arising from the sale of the same goods :—and this, although the former action was brought against the creditor and the sheriff, and the latter against the creditor alone. (3) Where the plaintiff failed in his first suit, on account of some defect in pleading, or from having mistaken the form of action, the judgment will not be conclusive, and he may bring another action to try the same right. (4)

In such cases, where a judgment is used, in order to shew that the identical complaint has been already determined by course of law, it should seem that substantially the judgment would be regarded as conclusive, though not pleaded by way

(1) *Hadley v. Green*, 2 Tyrw. 390. In this case the decisions of *Sedden v. Tutop*, *Bowden v. Horne*, *Bagot v. Williams*, and *Dunn v. Murray*, were reviewed.

(2) *Com. Dig. ibid. Putt v. Rawsterne*, 2 Mod. 319; 3 Mod. 1; Sir T. Raym. 472; S. C. 2 Bl. 831. See *Slade's case*, 4 Rep. 94;

Com. Dig. tit. Action, K. 3.

(3) *Hitchin v. Campbell*, 2 Bl. Rep. 827.

(4) *Robinson's case*, 5 Rep. 33; 6 Rep. 8 a.; *Com. Dig. tit. Action. Ferrars v. Arden*, Cro. Eliz. 668. *Godson v. Smith*, 2 B. Moors, 157.

of estoppel. It must be presumed, for example, that if a jury were to give a plaintiff damages for the same demand for which he had already recovered damages, a new trial would be granted. The importance of the point is, however, greatly diminished in consequence of the new rules of pleading. (1)

To shew right determined.

A verdict and judgment may be used to shew that the particular right in dispute has been decided between the parties upon a different complaint, which has been the subject of previous litigation. In such a case, if the former proceedings be pleaded by way of estoppel, they will, according to a rule of law, be conclusive in their effect. (2)

On the other hand, where previous proceedings are adduced, in order to shew the opinion of a former jury respecting the particular right upon which a new cause of action depends, there, if they be not pleaded by way of estoppel, they are not conclusive. (3) The effect of a former verdict in such a case may be supposed to vary very much with the nature of the inquiry, and the circumstances attending both investigations. (4)

The most important questions, which have arisen respecting the admissibility and effect of verdicts and judgments of the superior courts, have reference to their application for the last

(1) It has been seen, in treating of admissions, that certain admissions are always considered as estoppels, though they be not pleaded as such. And so it should seem that an award, upon the specific point in issue, would be conclusive in evidence. The use of the judgment is different from that which will presently be considered, where the same right has been determined, but not the same complaint.

(2) Vooght v. Winch, 2 B. & A. 662. Trevivian v. Lawrence, 3 Salk. 276, cited by Holroyd, J., 2 B. & A. 672. Rawlins's case, 4 Rep. 52. Per Lord Ellenborough, in Outram, v. Morewood,

3 East, 354, 365. Incledon v. Burgess, 1 Show. 28. Hooper v. Hooper, M'Clel. & Y. 509.

(3) Vooght v. Winch, 2 B. & A. 662, and cases in the last note. It is the verdict, rather than the judgment which is important, for the purpose in the text. Thus it is said by Lord Ellenborough, in Outram v. Morewood, 3 East, 354, "It is not the recovery, but the matter alleged by the party and upon which the recovery proceeds, which creates the estoppel."

(4) In Jones v. Reynolds, 7 C. & P. 335, the attention of the jury was directed by the learned Judge to the circumstance, that the former judgment was by *cognovit*.

mentioned purpose. The rule which has been stated, that a verdict is not conclusive in such cases, is derived from the doctrine of estoppels, according to which a jury is not bound to pay regard to an estoppel. (1)

It may be observed, with reference to this rule, that most of the ancient cases, from which the doctrine of estoppels is to be collected, relate to estoppels by the *deed* of a party: (2)—as to which, it can rarely happen, that where a deed is produced in evidence by a party to it against another party, though it be not specially pleaded by way of estoppel, a jury would not consider a party bound by the recitals in so solemn an instrument executed by himself, or that if they did not, a new trial would not be granted. So that, perhaps, the difference in point of effect between pleading a deed by way of estoppel, and giving it in evidence, is merely nominal. But in the case of verdicts, to which the doctrine of estoppels has been applied chiefly in modern times, where it is not known upon what evidence a former jury came to a decision, the second jury may be very likely, in many instances, upon the evidence before them, to come to a different conclusion. As regards verdicts, therefore, the rule, that an estoppel must be pleaded, is of great practical importance.

Pleading
estoppel.

The apparent reason for not allowing a conclusive effect to a verdict confirmed by a judgment, when not pleaded by way of estoppel, appears to be founded on the rules of pleading, and with a view to prevent surprise; but the same reason would be sufficient to preclude it from being given in evidence at all. In ancient times, when the doctrine of estoppels was established, it could rarely happen that there was not an opportunity of re-

(1) Goddard's case, 2 Co. 4 b. B. N. P. 298. It would seem, that this doctrine must be taken, with many qualifications, since the practice has existed of granting new trials.

(2) Com. Dig. Estoppel (A. 2). The estoppels by matter of record, mentioned by Comyns, relate

chiefly to the pleadings of parties and acts done by them in Courts of Record, and not to verdicts and judgments. On the application of estoppels to judgments and verdicts, see per Lord Ellenborough, in *Outram v. Morewood*, 3 East, 353.

lying upon an estoppel, especially if it were the usual case of an estoppel, by deed of party. But in more modern times, before the recent new rules, a party had often no opportunity of relying upon an estoppel; and there are not always the means of doing so, according to the present law, as, for example, in the case of actions of ejectment. It appears inconsistent that the principle of the authority of a *res judicata* should govern the decision of a *Court* when the matter is referred to them by pleading the estoppel, but that a *Jury* should be at liberty to disregard this principle altogether; and that the operation of such an important principle, as that of the *res judicata*, should depend upon the technical forms of pleading in particular actions. (1)

It has been held, that the rule that a judgment is not conclusive, unless pleaded by way of estoppel, applies to judgments in ejectment, when used for the purpose of establishing a right to mesne profits. (2) It may be observed, however, that if the recovery in the action for mesne profits be regarded as consequential upon the judgment in ejectment, the use of the judgment is not precisely the same as in the cases, in which it had been previously held, that estoppels must be pleaded, in order to make them conclusive.

Verdict upon
same matter.

Another important rule derived from the doctrine of estoppels, which is applicable to verdicts when produced in evidence, is, that the verdict should relate to the same subject matter as that in support of which it is afterwards used. The rule upon

(1) Some Judges have spoken of former verdicts being conclusive, which were not pleaded by way of estoppel, Lord Ellenborough, in *Hancock v. Welsh*, 1 St. 347. Lord Kenyon, in *Whateley v. Mannheim*, 2 Esp. 608. By Lord Ellenborough, *Strutt v. Bovingdon*, 5 Esp. 56. By Lord Kenyon, *Rex v. St. Pancras, Peake*, 220. It is remarkable, that Chief Justice De Grey, in his celebrated judgment in the *Duchess of Kingston's* case, which has often been cited by the Courts without qualification, stated that the judgment of a Court of

concurrent jurisdiction is, as evidence, conclusive. It would seem that the award of an arbitrator would be conclusive upon a cause of action arising subsequently to the award out of a right determined by him: See *Doe d. Morris v. Rosser*, 3 East, 15.

(2) *Doe v. Huddart*, 2 Cr. M. & R. 322. Upon the authority of *Vooght v. Winch*, and *Goddard's* case, overruling several *dicta* of a contrary import. *Budd v. Randall*, 3 Burr. 1353. *Aslin v. Parker*, 2 Burr. 665. Per Tindal, Ch. J., in *Doe v. Harvey*, 8 Bing. 242.

this subject, which is generally referred to, is that laid down by Chief Justice De Grey, in the *Duchess of Kingston's* case, (1) that "the judgment of a Court of Concurrent Jurisdiction, directly upon the point, is, as a plea to a bar, or, as evidence, conclusive between the same parties, upon the matter directly in question in another Court. But it is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

Where a verdict is offered, to prove a right to tithes, the right not being of a general nature, it is necessary to shew that the former proceedings related to the same lands as those, concerning which the right to tithe is in dispute. Thus, in *Benson v. Olive*, (2) where a bill by an impropiator was filed, demanding tithes, a decree obtained by a former impropiator, and a verdict obtained by himself, were rejected, on the ground that it was not proved that they related to the same lands, which were in the occupation of the defendant to the suit. And Lord Ellenborough, in commenting on the case of *Evelyn v. Haines*, in his judgment in *Outram v. Morewood*, (3) says, that the verdict in the former case could not be conclusive upon the right, because no issue was taken, in the first trial, upon any precise point. Same matter.

But it is sufficient, though no issue has been taken on the former trial, upon the precise point which is material in the second trial, if that point was essential to the finding of the

(1) 2 Howell's St. Tr. 538.

(2) Bunb. 284; Gwill. 701; 2 E. & Y. 24; and see *Scott v. Allgood*, Gwill. 1372. In *Benson v. Olive*, the defendant insisted upon an exemption for his lands, as being parcel of one of the greater abbies. It would seem, that if the defence had been a *modus*, the decree and verdict would have been admissible, *Travis v. Chaloner*, 3 Gwill. 1237. *Ashby v. Power*, Gwill. 1239.

(3) 3 East, 364. This subject of the identity of the matter deter-

mined is particularly illustrated by the cases respecting the judgments of Courts of Quarter Sessions, *infra*. See also the decisions respecting the identity of the matter determined in former recoveries, *supra*. It would seem not to be competent to explain, by parol evidence, that the point actually determined was identical. That the grounds of a former judgment may sometimes be explained, *vide infra*, as to judgments of Courts of Quarter Sessions.

former verdict. Thus, a conviction upon an indictment for non-repair of a road, is evidence against the parish convicted, and in favor of another parish, although the general issue was pleaded, and the prosecutor must have proved other matter besides the precise point of liability, *viz.* that the road was out of repair. (1)

Although the form of action be changed, yet, if the same matter be determined, the former verdict and judgment will be admissible in evidence upon a second trial. Thus, a verdict in replevin, upon an issue on the plea of *non tenuit*, to an avowry for rent, has been held admissible in a subsequent action of assumpsit, to recover the rent which was accruing at the time of the distress. (2) On a plea of usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond, between the same parties, is admissible for the plaintiff. (3)

Same parties.

In the next place, it is a rule applicable to the evidence of verdicts and judgments, that they are, in general, not evidence for or against a stranger to the judicial proceeding, in which they were obtained. It was resolved by Chief Justice Holt and the other Judges of the Court, upon a trial at bar, that no record of a conviction or verdict can be given in evidence, but such whereof the benefit may be mutual; that is, such as might have been given in evidence, either for the plaintiff or for the defendant. (4) And Chief Baron Gilbert lays it down, "that no body can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary." (5)

(1) *Rex v. St. Pancras, Peake*, 219; 2 Saund. 159. In like manner, where, before the new rules, the general issue was pleaded in actions of trespass, it has been doubted, whether the former recovery could be pleaded by way of estoppel; but it would seem, that with apt averments, it might be so pleaded.

(2) *Hancock v. Walsh*, 1 St. 347. Questions respecting the identity of the matter determined, when the form of action is changed, more

frequently arise, where an attempt is made to enforce the same complaint or demand, *vide supra*.

(3) *Cleve v. Powell*, 1 M. & R. 228.

(4) *Rex v. Warden of the Fleet*, Rep. temp. Holt, 134. B. N. P. 233, S. P. It is a rule of estoppels, that they must be reciprocal, Co. Litt. 352; Com. Dig. Estoppel. Gaunt. v. Wainman, 3 Bing. N. C. 69.

(5) *Gilb. Ev.* 28; B. N. P. 232; *Ward v. Wilkinson*, 4 B. & A. 412.

It seems obviously unjust, that proceedings should be evidence against a stranger, inasmuch as he had no opportunity of calling witnesses, or of cross-examining those on the other side, or of appealing against the judgment. (1) And it may perhaps be thought a sufficient reason for not allowing verdicts and judgments as evidence for a stranger, even against a party who was engaged in the former suit, that if the stranger had been party to that suit, instead of the person who succeeded in it, the result might have been different; for as the parties would in that case have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or perhaps, other evidence might have been produced by the party who lost the verdict. Under such circumstances, to admit a verdict or judgment as evidence would be giving a party indirectly the benefit of testimony, which he might be precluded from using directly in his own suit.

But in the same manner as admissions may be used against the real parties to a suit, though they be not the nominal parties to the record, it has been held that verdicts and judgments are receivable in evidence against the parties, on whose account the suits, in which the judgments were obtained, were instituted or defended. Thus, in the case of *Kinnersley v. Orpe*, (2) which was an action for a penalty incurred by destroying fish in the plaintiff's fishery, a verdict and judgment for a plaintiff in a former action, for a trespass committed in the same fishery against one who justified as servant, was allowed to be evidence against the defendant. For the defendant in the second

Real and nominal parties.

The same principle is adopted by Eyre, Ch. J., in his judgment in the *Duchess of Kingston's case*, 20 Howell's St. Tr. 538. The case of *Whateley v. Manheim*, 2 Esp. 608, in which it appears, that a verdict on an issue directed by the Court of Exchequer, was used by a stranger, does not appear consistent with principle.

(1) By De Grey, Ch. J., *Duchess of Kingston's case*, 20 Howell's St. Tr. 538.

(2) 2 Doug. 517. This case appears to be doubted by Lord Ellenborough, in *Outram v. Morewood*. It appears to be sanctioned by the Judges, in *Simpson v. Pickering*, 1 Cr. M. & R. 529, where it was held, that it was not sufficient to shew that a party to the former suit might possibly be really interested in the subsequent suit. And see *Hitchen v. Campbell*, *supra*.

suit acted by the command of the same person under whom the defendant in the first action had justified, who was considered to be the true party in both causes. In *Strutt v. Bovingdon*, (1) in an action on the case for the diversion of a watercourse against the same and two other defendants who justified under the defendant Bovingdon, a former verdict in a similar action against Bovingdon alone was held to be admissible as evidence of the plaintiff's right. In *Hancock v. Welsh*, (2) it was held, that a record in replevin between a tenant and the bailiff of his landlord making cognizance under him, was admissible evidence in a subsequent action between the tenant and the landlord himself.

Parties in
ejectment.

Upon the ground that the lessor of the plaintiff and the tenant are substantially the real parties to an ejectment, a judgment in ejectment is admissible evidence in an action for mesne profits, and this whether the action be brought by the nominal plaintiff, or by the lessor of the plaintiff, and whether the judgment be upon verdict or by default. (3) And notwithstanding

(1) 5 Esp. 56. The case appears to have been decided, on the ground that the defence in the second action was substantially the defence of Bovingdon alone; and not on the ground, that whatever is evidence in the nature of an admission against one defendant, is evidence against other defendants. Though it is said in B. N. P. 40, that a verdict on an issue out of Chancery, to which only one of the defendants was a party, may be read against all the defendants, to prove the time of an act of bankruptcy.

(2) 1 St. 347.

(3) *Doe v. Huddart*, 2 Cr. M. & R. 322. *Doe d. Lewes v. Preece*, 1 Tyrw. 410. B. N. P. 87, 232. *Aslin v. Parker*, 2 Burr. 665. *Hardr.* 472; *Gilb. Ev.* 33; *Bac. Ab. Ev. (F.)* 616. When the judgment is against the casual ejector, the landlord must have had notice of the ejectment, or it will not be evidence against him, *Hunter v. Britts*, 3 Camp. 455. The judgment in an action of ejectment on

the several demises of two or more persons, is evidence of title in an action of trespass, as it affirms some title to the lands in both the plaintiffs, which may well consist with a tenancy in common, *Chamier v. Clingo*, 5 M. & S. 64. In *Denn v. White* and *Ux.* 7 T. R. 112, it was held, that a recovery in ejectment against the wife, cannot be given in evidence in an action for mesne profits against husband and wife, and the observations of Lord Holt, in *Withers v. Harris*, *Salk.* 258, were questioned. In *Doe v. Whitcomb*, 8 Bing. 46, it was held, that the judgment in ejectment was evidence against a person who came in under the defendant in ejectment, whilst the ejectment was pending. But it is necessary to show, that the defendant in the action for mesne profits claims through or under the tenant in the ejectment, and if he held under a written agreement, it must be produced, *Doe v. Harvey*, 8 Bing. 242.

some former opinions to the contrary, it seems now settled, that a judgment recovered by the defendant in a former ejectment is admissible in evidence against the lessor of the plaintiff on the trial of a second ejectment, where the lessor of the plaintiff and the defendant are the same parties.(1)

Though the individual be the same in two suits, yet if he stood in a different character on the two occasions, he will not be effected by a verdict or judgment in the first suit. This doctrine has been established in regard to estoppels. A party suing as executor, in an action of debt upon a bond, will not be estopped by having been barred in an action upon the same bond, when he sues as administrator; but he may shew, that the letters of administration have been since repealed. (2)

Same parties.
Different right.

It is another rule derived from the doctrine of estoppels, that verdicts and judgments are admissible between persons who are in privity with the parties to the former proceedings; such privity is of three kinds, by blood, in law, and by estate.

Verdicts binding on privies.

A privity in blood, as an heir, may give in evidence a verdict for his ancestor, and is bound by a verdict against the ancestor. (3)

Privy in blood.

The examples given of privies in law by Lord Coke are "lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act of law, or in the *post*." (4) A verdict against an intestate or testator binds his representatives. (5) A verdict against an unmarried woman is admissible against herself and a husband, to whom

Privy in law.

(1) *Doe d. Strode v. Seaton*, 2 Cr. M. & R. 731. B. N. P. 232; 4 Bac. Ab. Ev. (F) See also *Wright v. Doe d. Tatham*, 1 A. & E. 19.

(2) *Robinson's case*, 5 Rep. 32, b. A woman is not estopped, after coverture, by an admission on record by her husband and herself during coverture, and an heir, claiming as heir of his father, is

not estopped by an estoppel upon him as heir to his mother, Com. Dig. Estoppel, C. *Vide supra*, the chapter on *Admissions*, where the same doctrine applies.

(3) *Locke v. Norborne*, 3 Mod. 141.

(4) Co. Litt. 352, b. *Outram v. Morewood*, 3 East, 353.

(5) *Rex v. Hebden*, Andr. 389.

she is afterwards married. (1) A judgment against a schoolmaster of a hospital is evidence against his successor. (2)

Vicar or rector. A verdict on a question of tithes, between a vicar and an occupier of land in the parish, is evidence between him and another occupier, the vicar in both suits claiming the same general right to tithes. (3) Upon this principle, a decree, in the Court of Exchequer, in a cause between the vicar on one side, and the impropiator on the other, (establishing the vicar's title to small tithes under an ancient endowment against the defendant, who insisted that he was only entitled to an annual payment in lieu of tithes,) was held to be evidence in suits between succeeding vicars and patrons; but not conclusive evidence, as it might have been, if the ordinary had been a party to the first suit. (4)

Judgment of ouster. The principle, of judgments being admissible against privies in law, affords a ground for the well known rule, that a judgment of ouster is evidence, in a *quo warranto*, against a person claiming to have been admitted to a corporate office by the party, against whom the judgment was obtained. (5)

Privies in estate. With regard to privies in estate, it does not appear to be clearly settled, how far the admissions of persons, having title to parts of the inheritance of the same estate, may be received against parties having title to other parts, and how far verdicts and

(1) *Outram v. Morewood*, 3 East, 345.

(2) *Lord Brounker v. Sir R. Atkins*, Skinn. 15, as to judgments against former churchwardens, see *Berry v. Banner*, Peake, 156.

(3) *Travis v. Chaloner*, 3 Gwill. 1237. And see *Ashby v. Power*, 2 Gwill. 1239. *Benson v. Olive*, 2 Gwill. 701.

(4) *Carr v. Heaton*, 3 Gwill. 1261.

(5) *B. N. P.* 231; 2 *Barnard*, 370. *Rex v. Lisle*, Andr. 163. *Rex v. Hebden*, 2 Str. 1109. 5 T. R. 72; 11 St. Tr. 216. *Rex v. Grimes*, 5 Burr. 2598, that the

evidence is not conclusive, *ibid.* 2 Selw. N. P. 1047. Judgment of ouster has been also considered in the nature of a judgment *in rem*. *Rex v. Mayor of York*, 5 T. R. 72, where *Rex v. Hebden*, and *Rex v. Grimes*, were cited to shew that the judgment was not *conclusive* against third persons. And Lord Kenyon is reported to have said, "If you derive title to a corporate office through A., and the prosecutor shew a judgment of ouster against A., it is conclusive against you, unless you can impeach the judgment as obtained by fraud."

judgments obtained for or against them may be received against such parties. It has been held, that where several remainders are limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder; (1) and that a verdict and judgment for or against a lessee is evidence for or against the reversioner. (2) But on the other hand, it has been held that a verdict against a tenant for life will not bind a reversioner, unless where the reversioner, in certain ancient forms of suit, had been made a party to the proceeding, upon *aid-prayer*. (3)

In an action brought by two persons for diverting water from their works, it appeared that one of them, whilst in the sole possession of the same works, had brought a former action for a similar injury against the same defendants, in which he had recovered a verdict and judgment against them. It was held, that this was *prima facie* evidence, that the present plaintiffs were privies in estate to the former plaintiff, and that the verdict and judgment in the former action were admissible in evidence against the same defendants in this action. (4)

It has been laid down that "a verdict is evidence for one under whom any of the present parties claim." (5) But this must be understood to mean a claim acquired through such party subsequently to the verdict, for it was said, that if the rule could be extended to parties claiming other lands under the same title previously to the verdict, the effect of such verdict might be carried back for an indefinite period. (6)

(1) *Pyke v. Crouch*, 1 Lord Raym. 730. B. N. P. 232. *Rushworth v. Countess of Pembroke*, Hardr. 472. Com. Dig. Ev. (A. 5.) *Bishop of Lincoln v. Ellis*, Bunb. 110, 1 E. & Y. 777, where a decree against the lessee of an improprator was produced against a subsequent improprator, and see *Warden of St. Paul's v. Morris*, 9 Ves. 155. *Kingworth v. Leigh*, Gwill. 1615. 3 E. & Y. 1385. *Carr v. Heaton*, Gwill. 1258. 3 E. & Y. 1320. *Doe v. Tyler*, 6 Bing. 390.

(2) Com. Dig. Ev. (A. 5) *Gilb. Ev.* 35, 36. Per Curiam, in *Rushworth v. Countess of Pembroke*,

Hardr. 472. The answer of an improprator is evidence against his lessee, *De Whelpdale v. Melburn*, 5 Fr. 485.

(3) B. N. P. 232, Hardr. 436; *Bac. Ab. Ev.* 617; see 12 Vin. Ab. 132. Judgment against mortgager after the mortgage, not admissible against mortgagee, *Doe v. Webber*, 1 A. & E. 119.

(4) *Blakemore v. Glamorganshire Canal Co.* 2 Cr. M. & R. 133.

(5) Com. Dig. Ev. (A. 5).

(6) Per Littledale, J., in *Doe d. Foster v. Earl of Derby*, 1 A. & E. 787.

Privy a witness.

Although, as we have seen, it is a principal reason for not allowing verdicts between different parties to be admissible, that one of the parties to the latter suit might have been a witness to the former one; yet, it has been held, that a former verdict is admissible between privies, notwithstanding they may have been examined in the former suit. (1)

Conviction of principal.

Some difference of opinion has arisen as to the point, whether a record of conviction of a principal felon is admissible evidence against the accessory. It seems that it is not admissible, where the indictment states not the conviction but the guilt of the principal felon. (2) A record of conviction, upon an indictment against a parish for not repairing a road, has been held to be strong evidence, if not conclusive, of the non-liability of another parish indicted for not repairing the same road. (3)

Of another parish.

Verdicts in criminal cases.

It follows from the rule that verdicts and judgments are only evidence between the same parties, that a conviction in a criminal proceeding cannot be admissible in a civil action. Where indeed the conviction has actually proceeded on the evidence of the party seeking to make use of it, the receiving of the conviction would be allowing a party to the suit to give evidence for himself. (4) But although, according to some au-

(1) *Blakemore v. Glamorganshire Canal Co.* 2 Cr. M. & R. 139.

(2) *Turner's case*, Mo. Cr. Ca. 348; see *Fost. Disc.* 111, c. 2, s. 2, p. 364. *Rex v. Smith*, Leach, 288. *Rex v. Baldwin*, 3 Camp. 265. The admissibility of the evidence is contrary to the principles above stated. It has been defended on the presumption "*omnia præsumuntur rite acta*," and on the ground of convenience, because the witnesses against the principal may be dead or not to be found.

(3) *Rex v. St. Pancras, Peake*, 219. Though this decision is not strictly in accordance with principle, yet it is to be considered that the dispute would, in reality, most probably be between the two parishes. Fraud, or want of notice,

would vitiate the former judgment, *ib.* 2 Saund. 159, a. *Rex v. Townsend*, 1 Doug. 421. *Rex v. Eardisland*, 2 Camp. 494. *Rex v. Justices of Lancashire*, 12 East, 368.

(4) *Smith v. Rummens*, 1 Camp. 9, case of a conviction before a magistrate. *Hathaway v. Barrow*, 1 Camp. 151. On this ground, witnesses have been deemed not incompetent upon indictments, where, if the indictment had been admissible in a civil suit, they might have been benefited by it, *Rex v. Boston*, 4 East, 581. *Burden v. Browning*, 1 Taunt. 521. And the same with respect to *qui tam* actions, *Abraham, q. t. v. Bunn*, 4 Burr. 2255. *Smith, q. t. v. Prager*, 7 T. R. 60. There are some contradictory decisions, which have

thorities, the evidence of convictions is rejected in civil suits, on the ground of the possibility, that the conviction might have proceeded on the evidence of the party seeking to use it, it seems now settled, that the evidence is inadmissible upon the more general ground of want of mutuality in the parties. (1)

In the case of *Hillyards v. Grantham*, (2) which was an issue directed by the Court of Chancery upon a question of legitimacy, a sentence against the supposed father and mother, upon a proceeding against them in the Consistory Court of Lincoln, for living together in fornication, was offered in evidence, to prove that they were not married; but the whole Court of King's Bench were of opinion, on a trial at bar, that the sentence could not be given in evidence; "because, first,

been overruled, on the ground that it is now established that a Court of Equity will not grant relief on a conviction, which proceeds on the evidence of the prosecutor. Lord Mansfield, in *Abraham v. Bunn*, 4 Burr. 2255, cites the case of *Rex v. Broughton*, 2 Str. 1230, as overruling *Rex v. Nunez*, 2 Str. 1042. *Rex v. Whiting*, 1 Salk. 283. *Rex v. Ellis*, 1104. So *Rex v. Eden*, 1 Esp. 97. *Rex v. Dalby*, Peake, 12, are apparently now overruled; see *Bartlett v. Pickersgill*, 4 East, 577, n. 1 *Eden*, 515, cited in *Abrahams v. Bunn*, 4 Burr. 2255, by Lord Mansfield, and by Lord Ellenborough, in *Rex v. Boston*, 4 East, 577.

(1) Per Parke, B., in *Blakemore v. Glamorganshire Canal Co.* 2 Cr. M. & R. 139, who observes, that, in the cases above noticed, the Judges were only assigning one reason which existed in the particular cases, instead of relying on the general principle. Chief Baron Gilbert seems to have been of opinion, that where the verdict in a criminal prosecution is supported by other testimony, besides that of the party who wishes to avail himself of it in the civil suit, there the verdict may properly be received in evidence, *Gilb. Ev.* 26. But this view of the subject

appears to be objectionable, because it cannot be known how far the jury relied upon the oath of the party. And Mr. Justice Buller lays it down, that a conviction in a Court of criminal jurisdiction is conclusive evidence of the fact, if it afterwards comes collaterally in controversy in Courts of civil jurisdiction, B. N. P. 245. It is there stated, that, in the case of a father convicted on an indictment for having two wives, a conviction would be conclusive evidence in an action of ejectment, where the validity of the second marriage is in question. B. N. P. 245, 2 Atk. 412. In support of this proposition, is cited the case of *Boyle v. Boyle*, 3 Mod. 164. *Comberb.* 72, S. C. where a party had been libelled for jactitation of marriage, and the Court of King's Bench granted a prohibition, because the Spiritual Court would not allow a plea that the plaintiff had been convicted of bigamy, in marrying the defendant, see *Brook v. Carpenter*, 3 Bing. 300. *Davis v. Nest*, 6 C. & P. 172, where a conviction obtained on the evidence of one defendant, was received in favor of the other defendants.

(2) Cited by Lord Hardwicke, in *Brownsord v. Edwards*, 2 Ves. 246, and in *Rep. temp. Hard.* 311.

it was a criminal matter, and could not be given in evidence in a civil cause; next, because it was *res inter alios acta*, and could not affect the issue; but they held, that if it had been a sentence on the point of marriage, in a question on the lawfulness of the marriage, it might have been given in evidence, being the sentence of a Court having peculiar jurisdiction."

Record of conviction.

In the case of *Gibson v. Maccarty*, (1) on an issue to try the genuineness of some promissory notes, depositions of a deceased witness having been read on the part of the plaintiff, (in which depositions the witness swore, that the defendant had acknowledged the notes in question and also another note,) it was proposed, on the part of the defendant, to shew by a record of conviction, that the plaintiff had since been convicted of forging this other note, mentioned by the deponent; for such evidence, it was said, would go to the credit of the deponent's evidence, as to the acknowledgment of the notes in question; and, secondly, because there is at all times a liberty given to examine into the plaintiff's character. But this evidence was opposed on the part of the plaintiff, on the ground, that no record of a criminal action can be given in evidence in a civil suit. Lord Hardwicke is reported to have said, "that the general rule was as had been stated by the plaintiff's counsel, (2) and that it had been so strictly kept, that in the case of *Hillyards*, on a question of legitimacy, the Court refused to admit a sentence of excommunication in the Spiritual Court for fornication between the father and mother of the party whose legitimacy was impeached."

Coroner's inquest.

Upon an issue to try the question of devise or no devise, a coroner's inquest, finding the deceased a lunatic, was offered in evidence against the plaintiff, who claimed as executrix, for the purpose of shewing, that the deceased was incompetent to make a Will; this evidence was objected to on the part of the plaintiff, and the Court were equally divided in opinion. The Chief Justice (Parker) was of opinion, that the inquest ought

(1) Rep. temp. Hard. 311.

(9) Acc. by Sir J. Mansfield, Ch. J., in *Hathaway v. Barrow* and

others, 1 Camp. 151. See also 12 Mod. 337.

to be admitted, "because it was for the plaintiff's advantage, as the personal estate would be saved by the finding of lunacy;" and he added, that in *Lord Derby's* case an inquest *post mortem* was allowed to be given in evidence. Mr. Justice Powys agreed with the Chief Justice. Mr. Justice Eyre said, "This is a criminal matter, and ought not to be given in evidence in a civil proceeding. A verdict on an indictment for battery cannot be read in an action for the same battery. An inquest *post mortem* is in the nature of a civil proceeding; but this is criminal, for it might induce a forfeiture of the goods, if he had been found *felo de se*." Mr. Justice Pratt said, "If a verdict be given in evidence, it must be between the same parties, and, therefore, an indictment at the suit of the king cannot be read in an action at the suit of the party." (1)

But in an action upon a bond, to which there was a plea of Penal action. usury, a verdict of acquittal in an action for the usury penalties on the same bond between the same parties was held to be admissible for the plaintiff. (2)

Where a person indicted for an assault pleads guilty to the Plea of guilty. charge, it may be thought that the evidence, being in the nature of an admission by the party himself against whom it is used, stands upon a different ground from a conviction upon the evidence of others. According to some old authorities, the record, in such a case, has been considered conclusive in an action for damages for the same assault; (3) it seems, at least, to be admissible. (4)

An acquittal upon an indictment has been considered not to Acquittal.

(1) *Jones v. White*, Str. 68.

(2) *Cleve v. Powel*, 1 M. & Ro. 228.

(3) Lamb. Inst. B. 2, c. 9, p. 427, cited 9 H. 6, 60, and 11 H. 4, 65.

(4) This point was so ruled by Wood, B., in an action for assault and battery, tried at Leicester Lent Ass. 1808. It was an undefended cause; but Mr. Baron Wood sug-

gested the objection, and, after consideration, admitted the record in evidence. On a subsequent occasion, Lord Tenterden doubted of the admissibility of such evidence. The point is of practical importance, where an assault can only be proved by the prosecutor; and the defendant pleads guilty, upon an understanding of a nominal fine being imposed.

be receivable evidence even upon a subsequent indictment, not indeed for the same offence, but where the same right is in litigation. Thus it has been said, that a verdict of not guilty, on an indictment against a parish for not repairing a road, would not be evidence for the parish on a second indictment. (1)

*Autre fois
acquits.*

The rule established in regard to the plea of *autre fois acquits* is, that an acquittal on a former indictment is a bar to a second indictment, where the first indictment is such as that the prisoner might have been convicted upon proof of the facts contained in the second indictment. Thus, an acquittal upon an indictment for burglary, in breaking and entering a house and stealing goods, is not a bar to an indictment for burglary in the same dwelling-house and on the same night, with *intent to steal*. (2) An acquittal, on an indictment for having been present aiding and abetting in a felony, is no bar to an indictment charging the party as accessory before the fact, (3) on

(1) *Rex v. St. Pancras, Peake*, 219. And it is said by Mr. Justice Buller, *B. N. P.* 245. *Gilb. Ev.* 32, that though a conviction in a Court of criminal jurisdiction, is conclusive evidence of the fact, if it come collaterally in controversy in a Court of civil jurisdiction; yet an acquittal does not prove the reverse, *because it does not ascertain facts*. It is to be observed, that the acquittal might have proceeded on some other ground, than the right of repair of a road, as, for example, on the ground that the road was not out of repair. It may be doubted, whether it would be competent to explain the ground of the former verdict and judgment. *Vide supra*, as to evidence to explain a judgment recovered, and *infra*, to explain the grounds of a judgment of Court of Quarter Sessions. Lord Kenyon said, that the verdict of acquittal could not be evidence for the parish, because the parties indicting the parish could not be bound by the former record, a reason which does not appear very satisfactory, especially as he held that the verdict would be conclusive against the parish.

An acquittal for the same offence is conclusive, at least, if it be pleaded, the parties being considered virtually the same in both proceedings, 4 *Co.* 40; 2 *Hawk. c.* 35, s. 1; *Hutchinson's case*, 1 *Show.* 6; *B. N. P.* 245, where the prisoner has been acquitted in Spain.

(2) *Per Buller, J.*, in *Vandercombe's case*, 2 *Leach*, 716; 2 *East's P. C.* 519, overruling *Turner's case*, *Kel.* 30; and *Jones and Bever's case*, *id.* 52: see 2 *Russell on Crimes*, 39, n. *Rex v. Taylor*, 3 *B. & C.* 502, indictment for keeping a gaming-house. *Coogan's case*, 1 *Leach*, 448, indictment for forgery. *Reading's case*, 2 *Leach*, 590. *Gilchrist's case*, 2 *Leach*, 364. *Rex v. Embden*, 9 *East*, 437, indictment for perjury. *Rex v. Sheen*, 2 *C. & P.* 634. *Rex v. Dunn*, 1 *Mo. Cr. Ca.* 424, former acquittal on a joint indictment. *Rex v. Russell*, 1 *Mo. Cr. Ca.* 356. *Rex v. Clark*, 1 *Br. & B.* 473, indictment for child-murder.

(3) *Rex v. Burchenough*, 1 *Mo. Cr. Ca.* 477. An anomaly in the law was supposed to have existed upon this subject; see 1 *Hale's P.*

the ground that the several offences described in the two indictments could not be said to be the same.

Verdicts are frequently admitted in evidence on the footing of hearsay statements, upon matters in which hearsay evidence is receivable; in such cases the reason of the rule, that a verdict is only admissible between the parties or privies, is not applicable; nor can verdicts, when used for this purpose, be pleaded by way of estoppel. The use of verdicts for the purpose of hearsay evidence has been considered in a former part of this Work. (1)

Verdicts, evidence of reputation.

SECTION II.

Admissibility and Effect in Evidence of Judgments of Inferior Courts.

The general principle, as to the conclusive effect of what has been regularly decided by a competent tribunal with regard to the same subject and the same cause of dispute, and between the same parties, or those succeeding to their rights and in respect of the same character, would seem to apply to all the constituted tribunals of this country at least, whether superior or inferior, whether of record or not of record. (2) But it appears that the weight of authority is in favor of the judgments of inferior Courts, not of record, being examinable, at least, where an action is expressly brought upon them; though they are *prima facie* evidence of a debt being due.

Judgment whether conclusive.

C. 626; 2 Hale, 224; Hawkins, b. 2, c. 35, s. 11; Foster's Cr. Ca. 361.

(1) *Vide supra*, p. 263.

(2) Not only is an actual adjudication binding upon the parties, but it has been held, that payments made in consequence of suits commenced, cannot be gainsaid, see *Marriott v. Hampton*, 7 T. R. 269.

Brown v. McKinally, 1 Esp. 279. See *Greathead v. Bromley*, 7 T. R. 455. *Schamann v. Eatherheart*, 1 East, 537. Per Lord Tenterden, in *Johnson v. Durant*, 2 B. & Ad. 930, where the same principle is adopted in regard to summary applications; and see the authorities in favor of the conclusive effect of foreign judgments, *infra*.

In the case of *Moses v. Macfarlane*, (1) it was decided, that a sum of money, paid under the direct authority of an inferior Court, might be reclaimed as unduly paid. This decision has given great dissatisfaction. (2) It proceeded on the ground, not that the judgment was wrong, but that, (for a reason which the defendant in the Court below could not avail himself of against that judgment,) the defendant in the Court above ought not in justice to keep the money. Lord Mansfield expressly said, that the merits of a question, determined in the Court below, never could be examined over again in any shape whatever. It is to be observed, that the judgment in that case was by commissioners of a Court of Conscience, and not a judgment of record; yet Lord Mansfield does not appear to have considered it the less conclusive on that account.

In the Irish case of *Gahan v. Mainjay*, (3) the Lord Chancellor observes, that the Ecclesiastical and Admiralty Courts are not Courts of Record, and that sitting in a Court of law, he was not at liberty to enter into the examination of the justice or injustice of any judgment of a Court of competent jurisdiction, unless it came before him by a writ of error. It has however, been frequently stated, that inferior Courts, not of record, have not the privilege of not having their judgments controverted. (4)

(1) 2 Burr. 1005.

(2) Per Chief Justice Eyre, in *Philips v. Hunter*, 2 H. Bl. 402. 2 Pothier, by Evans, p. 350, who attributes the judgment to an imperfect comprehension, on the part of Lord Mansfield, of a maxim of the civil law. In *Philips v. Hunter*, it was ruled, that if a creditor in England, after a trader has become a bankrupt, attaches his property in a foreign country, he is liable for the amount to the assignees.

(3) Cited 2 Evans's Pothier, 353. The Court of Chancery affords another example. So judgments of Excise Commissioners, though not of record, are final, *id.* *Roberts v. Fortune*, 1 Hargr. Law

Tracts, 446; see also *Moody v. Thurstan*, Str. 481. The decision of a private arbitrator, as to merits, is conclusive, see *Johnson v. Durant*, 2 B. & Ad. 930. *Jupp v. Grayson*, 1 Cr. M. & R. 523. *Barrett v. Wilson*, 1 Cr. M. & R. 586. The distinction between Courts which are of record, and those which are not of record, is itself a question of some nicety, and depends on circumstances, not much connected with the reasons for their decisions being conclusive or not; *Wood's Inst.* p. 443.

(4) By Lord Mansfield, in *Walker v. Wetter*, Doug. 3. By Buller, J., in *Galbraith v. Neville*, Doug. 6, n. By Littledale, J., in *Guiness v. Carroll*, 1 B. & Ad. 463. And

Where, indeed, it appears that a judgment has been pronounced in an inferior Court, without due notice having been given to the parties of the proceedings, the judgment will not be enforced, the matter not having been duly submitted to the jurisdiction of the inferior Court. (1) Where a summons and attachment, returnable at the same time, were issued at the same time, and neither of them was served personally, and the plaintiff declared and had judgment, the defendant not appearing; though this was certified to be the practice of the Court, the proceedings were vacated upon a writ of error; (2) and it is conceived, that they would have been equally unavailing in an action. Where a judgment by foreign attachment was relied on by way of defence in an action, it was held of no avail, on account of want of notice to the defendant in the Court below. It was said by the Chief Justice, that a custom to proceed in the absence of the defendant, without summoning him or giving him notice, was contrary to the first principles of justice, and could not be supported. (3) Where a judgment and process of execution in a County Court were pleaded in bar to an action of trespass, it was held, that a jury were at liberty to consider the whole proceedings fraudulent and collusive, it appearing that the process of the Court had not been served, nor an appearance duly entered; and this, notwithstanding that a motion to set aside the proceedings in the Court below had been made without effect. (4) The record of an inferior Court is not conclusive, but only *prima facie* evidence that the debt arose within the jurisdiction of the Court. (5)

When examin-
able.

It does not appear to be clearly settled, to what ex-

see *Barnes v. Wenklar*, 2 C. & P. 345. *Thompson v. Blackhurst*, 1 Nev. & M. 266. The point is closely connected with the subject of the effect of foreign judgments, *infra*.

(1) See *infra*, various examples to the same effect in regard to foreign judgments, and in proceedings by Visitors.

(2) *Williams v. Lord Bagot*, 3 B. & C. 772; see *Pratt v. Dixon*, Cro.

Jac. 108. *Ward v. Ellayn*, Cro. Jac. 261.

(3) *Fisher v. Lane*, 3 Willcs, 303.

(4) *Thompson v. Blackhurst*, 1 Nev. & M. 273.

(5) *Huxham v. Smith*, 2 Camp. 21. See *Briscoe v. Stevens*, 2 Bing. 215, where the plaintiff in the inferior Court had failed. *Herbert v. Cooke*, 3 Doug. 101.

tent, beyond the grounds of objection already noticed, the judgments of inferior Courts are examinable. Assuming that they are examinable for all purposes, as in the case of a new trial, where an action is expressly brought upon such judgments, it does not follow that they should be subject to the like examination, where they have been acted upon, or where a complaint in the Court below has been dismissed upon the merits. (1)

In a *nisi prius* case, indeed, (2) it has been held, that where a plaintiff had sued for a debt in a County Court, and his complaint was dismissed on the merits; he might, nevertheless, afterwards sue in the superior Courts for the same demand, and the former proceedings would not be conclusive against him; but that it was proper for the consideration of the jury, as something might have occurred in the County Court, which was not brought before the jury in the second action. But in the case of *Huxham v. Smett*, (3) where the defendant had, under process of foreign attachment in the Mayor's Court, paid a sum of money to a creditor of the plaintiff, it was held, that although the record was only *prima facie* evidence of the jurisdiction of the Court, yet that if there were no excess of jurisdiction, it would be conclusive as to the obligation to pay the money. Lord Ellenborough observed, that if the money was paid pursuant to the judgment of a Court of Competent Jurisdiction, he must presume *omnia rite acta*; and that he could not unravel the proceedings and grant a new trial.

When a cause is removed by *habeas corpus* from an inferior Court, after judgment by default, that judgment is not evidence against the defendant in the superior Court. For the judgment may have been suffered by default, with the express view of removing the cause into the superior Court, and the effect of holding the judgment by default in the inferior Court to be an

(1) See *infra*, this subject considered in regard to foreign judgments.

(2) *Barnes v. Wenkler*, 2 C. & P. 345.

(3) 2 Camp. 19.

admission of a cause of action, would be to turn the trial in the inferior Court into an execution of a writ of inquiry. (1)

The decisions respecting the effect of judgments of Courts of Quarter Sessions, particularly illustrate a doctrine laid down in the *Duchess of Kingston's* case, that a judgment is conclusive evidence between the same parties, upon a matter directly in issue, but is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. (2)

A judgment of a Court of Quarter Sessions, discharging an order of removal, (not for defect of form but upon the merits,) is conclusive as between the contending parishes, (but not as to a third parish,) to establish this, that the settlement of the pauper was not in the appellant parish at the time of the removal. (3) And if a woman were to be removed from the one parish to the other, as the pauper's wife, the former judgment would be conclusive, on an appeal against her removal between the same parishes, that the husband was not settled there at the time of the prior order. So, if the respondents should prove a derivative settlement for the pauper from his *father*, it would be competent to the appellants to show, that the father was removed from the respondent parish to their parish, as his place of settlement, and that the order for his removal was reversed; such evidence would be admissible, because the precise point, which is a necessary part of the proof in the second appeal, has been determined on the first appeal. (4) But it has been held, that it would not be competent to show that the pauper's *brother* was removed, and the order of removal reversed, though the settlement proved for the pauper should be one derived from the common father; because the father's settlement must have come into question on the former appeal, (if it came into question at all), only collaterally and incidentally. (5)

Courts of
Sessions.

3. Subject
matter of judgment of q. sess.
in appeals.
Order discharged.

Its effect, in
disproving a
settlement, as
to appellant
parish.

Privy to person removed.

(1) *Bottings v. Firby*, 9 B. & C. 762.

(2) *Duchess of Kingston's* case, 20 Howell's St. Tr. 613.

(3) *Rex v. Sarratt*, Burr. S. C. 73. *Harrow v. Rislip*, Salk. 524.

(4) *Rex v. Catterall*, 6 M. & S. 83.

(5) *Rex v. Knaptoft*, 2 Barn. & Cres. 883. The respondents here proved a *prima facie* case of settlement, by proof of relief to the

Effect as to
removing
parish.

It appears to be clear, from considering the language and nature of an order of removal, and the nature of judgments in appeals against such orders, that a judgment, reversing an order of removal from A. to B., ascertains nothing but this negative proposition, namely, that at a certain time the pauper was not settled in B. the appellant parish, and upon this point it is conclusive in any future appeal between the same parishes. But with regard to the removing parish, this judgment determines nothing affirmatively. If, therefore, afterwards, B. should remove the same pauper to A., and A. should appeal, that judgment could not be used by B. as evidence of the pauper's settlement in A.: the judgment itself professes nothing upon that point, and affords not the least reason for supposing, that a settlement in A. was ever any part of the subject of inquiry. It finds the *negative*, that there was no settlement in B.: but as to the *affirmative* proposition, of a settlement ever having been in A., such a judgment is a mere blank, and supplies no kind of information.

An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, the appellant parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish. It is competent to the removing parish to shew, by parol evidence, that the former order was quashed on the ground that the pauper was not removable, as residing on a settlement of his own, or was not chargeable. (1)

pauper. The case was determined on the authority of the observations of Chief Justice De Grey, in the Duchess of Kingston's case. Although the father's settlement was not the direct point in issue upon the former appeal, yet parol evidence was tendered, to shew that it was, in fact, the point decided. But Mr. Justice Bayley said, that assuming the parol evidence to be admissible, still the judgment could not be received on the authority of the *dictum* of Chief Justice De Grey. If the parol evidence was

admissible, that *dictum* seems not to apply.

(1) *Rex v. Wick St. Lawrence*, 5 B. & Ad. 526. *Rex v. Wheelock*, 5 B. & C. 511. *Osgathorpe v. Diseworth*, 2 Str. 1256. On the subject of explaining the grounds of a decision by parol evidence, *vide supra*, on the effect of former recoveries. The cases, in which such evidence has been received, have been those, where a judgment, apparently an estoppel, has been explained not to be so in fact.

It is a peculiarity in the effect of a judgment of a Court of Quarter Sessions, not in conformity with the principles which prevail in other cases of judgments, that an order for the removal of a pauper confirmed on appeal is not only admissible, but conclusive of the pauper's settlement at the time of the order, between the appellant parish, and any third parish, or any subsequent appeal. (1) It may be observed of this exception, that the parish, against whom the judgment was pronounced, had an opportunity of discharging themselves by proving the liability on a third parish. And although cases may occasionally occur, in which a parish might have means of proving the liability on a third parish, which they are precluded from using in a proceeding between themselves and the removing parish, yet this does not commonly happen, and perhaps the prevention of a great deal of parochial litigation may have been deemed a sufficient ground for departing from the ordinary rule. (2)

A pauper was removed by order of justices to a parish, which consisted of several townships maintaining their own poor jointly, which order was acquiesced in, and afterwards one of the townships separated itself from the parish, and thenceforth maintained its own poor separately: the same pauper was afterwards removed to the township so separating itself: on an appeal against the order, it was held, that the former order was not conclusive on the township. The case was apparently decided on the ground, that the parties were not the same; it was spoken of by the Court as one of considerable difficulty. (3)

(1) Admitted, *Rex v. Rialip*, 2 Bott, 700. 2 Salk. 524. *Rex v. Bentley*, 2 Bott, 704. *Rex v. Sar-ratt*, 2 Bott, 702. An order executed and unappealed against, has the same effect. *Rex v. Kenfieldworth*, 2 T. R. 598. *Rex v. Corsham*, 11 East, 388. The order is conclusive, not only of the settlement of persons named in the order, but also as to children not included by name, *Rex v. St. Mary, Lambeth*, 6 T. R. 615. *Rex v. Catterall*, 6 M. & S. 83, so

though it appear that the district removed to was described as a parish, instead of a township, *Spitalfields v. Bromley*, 18 Vin. Ab. 468. *Rex v. Kirkby Stephen*, Burr. S. C. 664.

(2) In many instances, where the same evidence precisely would be adduced upon the second appeal, and the same facts elicited, the experiment of a second appeal would frequently be made.

(3) *Rex v. Oldbury*, 4 Ad. & E. 167.

SECTION III.

*Proceedings in Foreign Courts.*Foreign judgments *in rem*.

Real property.

Moveable property.

With respect to judgments in foreign Courts proceeding *in rem*, it appears, by the general consent of nations, that if the matter in controversy is land or other immoveable property, the judgment pronounced in the *forum rei sitæ* is of universal obligation. The same principle has generally been applied as to moveable property, within the jurisdiction of the Court pronouncing the judgment. Thus, a foreign judgment against a garnishee, upon proceedings by way of foreign attachment, is not examinable in the English Courts. (1)

Admiralty sentences.

Another example of the application of this principle in the case of judgments *in rem*, concerning moveable property, is afforded by the proceedings of foreign Courts of Admiralty. "It has been clearly settled," said the Master of the Rolls, in the case of *Kindersley v. Chase*, (2) "from the time of Lord Hale down to the present period, that a sentence of condemnation in a Court of Admiralty, when it proceeds on the ground of enemy's property, is conclusive, that the property belongs to enemies, and not only for the immediate purpose of such sentence, but is binding on all Courts and against all persons. The sentence of a Court of Admiralty, proceeding *in rem*, must bind all parties, must bind all the world."

In the case of *Hughes v. Cornelius*, the leading case on this

(1) *Phillips v. Hunter*, 2 H. Bl. 410. The process of attachment will, however, be void, if obtained in the absence of the party affected, *Cavan v. Stewart*, 1 St. 525, *infra*, p. 539.

(2) *Cockpit*, July 1801. Park, Ins. 490. *Hughes v. Cornelius*, 2 Show. 232. Sir T. Raym. 473. *Graham v. Maxwell*, 2 Dow. 314. *Hamilton v. Dutch E. I. Co.* 8 Br. P. C. 264. *Bernardi v. Motteux*,

2 Doug. 575. As to the effect of an Admiralty sentence of acquittal, *Le Caux v. Eden*, Doug. 605, commented on in *Obichini v. Bligh*, 8 Bing. 347. When an Admiralty Court has jurisdiction of the original matter, it has jurisdiction of every thing necessarily incidental, as the amount of damage, or the like, *ib.* *Faith v. Pearson*, 2 Marsh. 133. *Smart & Wolff*, 3 T. R. 323.

subject, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period down to the present, the doctrine, there laid down, has been considered as applicable to questions of warranty in actions on policies, as to questions of property in actions of trover. (1) And it may now be assumed as the settled doctrine of Courts of English law, that all sentences of foreign Courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies of insurance, on every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially. (2) "It is now too late," said Mr. Justice Lawrence, (3) "to examine the practice of admitting these sentences to the extent to which they have been received, supposing that practice might at first have appeared doubtful. On the authority of those decisions men have acted for a long series of years, and entered into contracts of assurance in this country, with a knowledge of such decisions, and in expectation that the questions, arising out of such contracts, to which the decisions are applicable, will be ruled by them."

General rule.

Such a sentence of condemnation will be binding on the rights of third persons, as well as on the parties to the original suit; it is conclusive between the assured and the underwriter, with respect to every fact which it professes to decide. Thus, when it proceeds on the ground of enemy's property, it is conclusive, that the property belongs to enemies, not only for the immediate purpose of such a sentence, but it is binding on all Courts and against all persons. (4) And the sentence is binding, whether it proceed to condemn the ship expressly as being enemy's property, or whether such a ground of decision

Conclusive of what.

(1) By *Chambre, J., Lothian v. Henderson*, 3 Bos. & Pull. 513.

(2) *Bolton v. Gladstone*, 5 East, 160. *Christie v. Secretan*, 8 T. R. 196. *Kindersley v. Chase, Park*, Ins. 486.

(3) *Lothian v. Henderson*, 3 Bos.

& Pull. 524. *Baring v. Clagett*, 3 Bos. & Pull. 214. See 1 Camp. 432.

(4) *Kindersley v. Chase, Park*, Ins. 490. All the previous cases on this subject are there collected.

can only be collected from other parts of the proceedings; and this, although it appear on the face of the sentence, that the prize-court arrived at the conclusion through the medium of rules of evidence and rules of presumption, established only by the particular ordinances of their own country, and not admissible on general principles. (1)

Effect of sentence.

The sentence is conclusive evidence of the points upon which it professes to decide. (2) Thus, for example, if it proceeded upon the ground of the property not being neutral, it is conclusive against the insured, that he has not complied with his warranty. (3) If no special ground is stated, and the ship is condemned generally as lawful prize, it is to be presumed from the condemnation, as no other cause appears, that the sentence proceeded on the ground of the property belonging to an enemy; and the sentence, in such a case, has been held to be conclusive evidence, that the property was not neutral. (4)

When not conclusive.

Where the sentence professes to be made on particular grounds, which are set forth in the sentence, but which appear not to warrant the condemnation, the sentence will not be conclusive as to such facts. (5) Or if the sentence has not decided the question of property, nor declared whether it be neutral, but condemned the property as prize, solely on the ground, that the ship had violated an *ex parte* ordinance, to which the neutral country had not assented, or on the ground of a foreign ordinance against the law of nations, such a sentence, though conclusive of the question of prize or no prize, would not be conclusive of the fact, whether or not the ship were neutral. (6)

Foreign ordinance.

Equivocal grounds.

The ground alleged in the sentence is presumed to be that

(1) *Bolton v. Gladstone*, 5 East, 155. 2 Taunt. 85. *Baring v. Roy*, Ex. Ass. Comp. 5 East, 99.

(2) *Christie v. Secretan*, 8 T. R. 196. *Fisher v. Ogle*, 1 Camp. 418. *Everth v. Hannam*, 2 Marshall, 72. *Marshall v. Parker*, 2 Camp. 70.

(3) *Barzillay v. Lewis*, Park, Ins. 469. *Baring v. Clagett*, 3 Bos. & Pull. 201.

(4) *Saloucci v. Woodmas, Park*, Ins. 471. 8 T. R. 444.

(5) *Calvert v. Bovil*, 7 T. R. 523. 8 T. R. 444.

(6) *Pollard v. Bell*, 8 T. R. 444. *Bird v. Appleton*, 8 T. R. 562. *Baring v. Clagett*, 3 Bos. & Pull. 215. *Bolton v. Gladstone*, 2 Taunt. 85, 95. Sec 2 Camp. 154.

on which the confiscation proceeded; (1) but the sentence of a foreign Court of Admiralty, is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the ground is. It must not be collected by inference only, or left in uncertainty, whether the ship was condemned on one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. (2)

Sentences of condemnation in foreign courts of prize, are admissible only where such courts are constituted according to the law of nations, and exercise their functions either in the belligerent country, or in the country of a co-belligerent, or ally in the war. (3) It has, therefore, been determined, that a sentence, pronounced by the authority of the capturing power within the dominions of a neutral country,*to which the prize may have been taken, is illegal, (4) and consequently would not be admissible evidence to falsify the warrant of the neutrality.

Want of jurisdiction.

Much controversy has existed among writers on general law, as to the point whether foreign sentences, which affect the general capacity of persons, and those which concern marriage or divorce, ought to be conclusive. The sentence of a foreign Court of competent jurisdiction, directly establishing a marriage in that country, would be conclusive in any of our Courts on the validity of the marriage. (5) It seems that a sentence of

Sentences affecting capacity.

Marriage.

(1) *Honeyer v. Lushington*, 3 Camp. 89. *Bernardi v. Motteux*, Doug. 581.

(2) Per Tindal, Ch. J., in *Dalgleish v. Hodgson*, 7 Bing. 504. *Fisher v. Ogle*, 1 Camp. 417. *Calvert v. Bovill*, 7 T. R. 523. *Bernardi v. Motteux*, Doug. 581. The sentence is not evidence of what may be gathered by inference, *Fisher v. Ogle*, 1 Camp. 418.

(3) *Oddy v. Bovil*, 2 East, 473.

(4) *Havelock v. Rockwood*, 8 T. R. 268. *Case of Flad Oyen*, 8 T. R. 270, n. 1 Rob. Adm. Rep. 135. *Donaldson v. Thompson*, 1 Camp.

429. The practice of different States differs as considering sentences, *in rem*, conclusive upon all the points which are incidentally disposed of by the sentence, and of the facts and allegations upon which they profess to be founded. *Story on the Conflict of Laws*, p. 496.

(5) Per Lord Hardwicke, in *Roach v. Garvan*, 1 Ves. 159. Also a case, temp. Car. 2, cited by Lord Hardwicke, in *Boucher v. Lawson*, Ca. temp. Hard. 89. 2 Swanst. 349.

nullity of marriage, in the country where it was solemnized, would, at least, carry with it great authority in this country. (1) But a judgment of a third country, upon the validity of a marriage not within its territory, nor between the subjects of that country, though admissible, would not have the like authority. (2)

Divorce.

The weight of authority in the English Courts is against admitting, that any valid sentence of divorce can be pronounced in regard to a marriage celebrated in England between English subjects; (3) on the ground, that it is not just that one party should be able to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed.

Penal sentences.

On a criminal charge, (as for murder committed in a foreign country, where it is indictable here,) an acquittal in that country may be pleaded here in bar to an indictment for the same offence. (4)

(1) *Sinclair v. Sinclair*, 1 Hagg. 297. It seems that it would be conclusive, *Cottington's case*, 2 Swanst. 342, n.

(2) *Sinclair v. Sinclair*, 1 Hagg. 297. *Scrimshire v. Scrimshire*, 2 Hagg. 340, 397.

(3) By the twelve Judges in *Lolly's case*, R. & R. 237. *Tovey v. Lindsay*, 1 Dow. 124, in which the opinions of Lord Eldon and Lord Redesdale appear to have coincided with that of the Judges. *McCarthy v. De Caix*, cited 3 Hagg. 642, n. A different doctrine is maintained by the Scotch and the American Courts, 2 Kent. Comm. 92. *Story de Conflictu Legum*, 499. By both of which jurists the reasoning and authorities in favor of both views of this important question, are collected with great learning and ability. In the case of *Conway v. Beasley*, 3 Hagg. 639, the opinion of the Ecclesiastical Court was intimated, that an English marriage might be avoided by a Scotch divorce, if the parties were *bond fide* domiciled in Scotland. The Scottish divorce in that case was avoided, on the express ground, that there was no *bond fide*

change of domicile. The language of this judgment has had the effect of unsettling the opinion of the Profession derived from *Lolly's case*. In consequence of the unsatisfactory mode in which questions on Crown law are determined, no reasons were assigned by the Judges in that case,—which considerably diminishes its authority.

(4) *Hutchinson's case*, cited 1 Show. 6; also in 2 Str. 733. *Roche's case*, 1 Leach, 160. B. N. P. 245. The reason assigned, by Buller, J., appears to be too general, as it would apply to civil judgments also. It may be considered that, in general, crimes are cognizable exclusively in the country where they are committed, and the penal laws of one country cannot be taken notice of in another, see *Folliott v. Ogden*, 1 H. Bl. 135. *Ogden v. Folcott*, 3 T. R. 733, 734. *Wolff v. Oxholm*, 6 M. & S. 99. *Story on the Conflict of Laws*, ch. xvi. Where one country in particular cases punishes crimes committed in another, peculiar deference seems, on the foregoing principles, to be due to the tribunals of the country, where the offence was

Some difference of opinion appears to have prevailed in the English Courts, respecting the effect of a foreign judgment in an action brought directly upon it. It is clearly established, that in such cases a foreign judgment is *prima facie* evidence to sustain the action; but the question has been, whether it is to be deemed conclusive, and, if not conclusive, to what extent and in what manner the original merits can be properly inquired into.

Judgment,
action on,
whether con-
clusive.

It seems to have been the opinion of Lord Nottingham, (1) Lord Hardwicke, (2) Lord Kenyon, (3) and Lord Ellenborough, (4) that foreign judgments are conclusive in evidence. But Lord Mansfield, (5) Chief Baron Eyre, (6) and Mr. Justice Buller, (7) appear to have expressed a contrary opinion.

In the cases in which the opinions of these learned persons were delivered, it does not appear to have been necessary to decide the express point under consideration. In a recent case in Equity, the Vice Chancellor, after an examination of the authorities, held that the grounds of a foreign judgment could not be revised in the Courts of this country, and that a bill for a discovery and a commission to examine witnesses in Antigua, in aid of the plaintiff's defence to an action brought on a foreign judgment in this country, was demurrable. (8)

committed, as such interference can only be justified on the ground of peculiar necessity.

(1) 2 Swanst. 326, n.

(2) Boucher v. Lawson, Cas. temp. Hard. 89. See also Roach v. Garvan, 1 Ves. 157.

(3) Galbraith v. Neville, Doug. 5, n., expressing doubts concerning the doctrine laid down in Walker v. Whitter, *post*. The Court refused a new trial, on the ground that the judgment was, at all events, *prima facie* evidence.

(4) Tarleton v. Tarleton, 4 M. & S. 21, *infra*.

(5) In Walker v. Witter, Doug. 1; Herbert v. Cook, Willes, 36, n., the observations were merely incidental.

(6) In Phillips v. Hunter, 2 H. Bl. 410.

(7) In Galbraith v. Neville, Doug. 5, n., relying upon the decision of the House of Lords, in Sinclair v. Fraser, Doug. 5, n. 20 Howell's St. Tr. 468. In that case it was declared by the House of Lords, "That the judgment of the Supreme Court of Jamaica ought to be received as evidence *prima facie* of the debt, and that it lies upon the defendant to impeach the justice thereof, or to shew the same to have been irregularly or unduly obtained. Perhaps in Arnott v. Redfern, 3 Bing. 353; Guinness v. Carrol, 1 B. & Ad. 463, the Court may be thought to have considered that foreign judgments were not conclusive.

(8) Martin v. Nicolls, 3 Sim. 458.

A judgment truly verified and proved to be the law of the foreign Court.

appealed to the House of Lords until 1804.

See also v. Turner, 1 Binn. 141 & R. 277 - Roscoe's Ex. P. 505.

Impeachable.
Manifest error.

The present doctrine of the Courts of Common Law appears to be, that where a foreign judgment proceeds upon an error in law apparent on the face of it, it may be impeached; and this, even where it is set up in answer to an action, and the action is not brought upon it. Thus in the case of *Novelli v. Rossi*, (1) where it appeared that the French Court had mistaken the law of England as to the effect of the cancellation of a bill of exchange, and that their decree had been founded upon such mistake, the defendant was not allowed to set up the decree, in answer to the plaintiff's claim.

But on the ground, that the foreign Courts are much more competent to decide questions arising upon the law of the foreign country, the English Courts will not set aside the judgments of foreign Courts for a mistake of law, unless they see very plainly that such a mistake has been committed. (2)

Absence of
parties.

A foreign judgment is not available in the Courts of this country, either for the plaintiff or defendant, if anything appears in the record of the proceedings, on which the judgment is founded, contrary to reason and justice. If the judgment, for example, should have passed against a defendant, who does not appear to have been served with process, or to have had any opportunity of defending the action, such a judgment would not be enforced by Courts of Justice in this country. This point occurred in the case of *Buchanan v. Rucker*, (3) where it appeared from the proceedings, that the summons had been served by nailing up a copy of the declaration on the door of

(1) 2 B. & Ad. 757. The defendant contended, that he had indorsed two bills to the plaintiff in discharge of the debt which was the subject of the plaintiff's claim. The bills were cancelled by mistake, and the defendant procured a decree discharging himself from liability on account of the cancellation, and that the bills should remain to the plaintiff's debit. In *Buchanan v. Rucker*, 1 Camp. 67, Lord Ellenborough says, that there might be such glaring injustice on the face of a foreign judgment, or

it might have a vice rendering it so ludicrous, that it could not raise an assumpsit, and if submitted to the jurisdiction of the Courts of this country could not be enforced.

(2) *Becquet v. M'Carty*, 2 B. & Ad. 957. The action was brought upon the foreign judgment. *Ali-von v. Furnival*, 1 Cr. M. & R. 293. The action was brought upon an award made by order of the foreign Court; and see in *Arnott v. Redfern*, 3 Bing. 353.

(3) 1 Camp. 63; 9 East, 192, S. C.

the court-house; and it was adjudged, that although such might be the practice abroad, it was a practice inconsistent with all principles of justice, and that the judgment therefore could not be made the ground of an action of assumpsit. It will be necessary therefore to prove, that the party was duly summoned; or, if he is described in the proceedings as an absentee, that he had absented himself from the country.(1) With respect to the proof of his absence, that fact might perhaps be inferred from a return of *non est inventus* to the process issued against him, if it be proved that he had been in the country. (2)

But it has been held to be no objection to a colonial judgment, that the party, against whom it was obtained, was absent from the colony, where by the law of the colony, in the case of a person formerly resident in it absenting himself, and not leaving any attorney, the procurator fiscal was bound to take care of the interests of such absent party. (3) An action lies on a Scotch judgment of horning, notwithstanding it is obtained in the absence of the party affected by it, the party having property within Scotland, and public proclamation having been given according to the Scotch law. (4) An action may be maintained on a foreign judgment obtained by default, which states that the defendant appeared by attorney, without proving that the attorney mentioned had authority to appear; for the judgment must have credit for the facts which it specifically alleges. (5)

It may reasonably be doubted, whether the Courts would feel

Merits, whether examinable.

(1) *Buchanan v. Rucker*, 9 East, 192. *Cavan v. Stewart*, 1 Stark. N. P. C. 525, and see *Frankland v. M'Gusty*, 1 Knapp. Pr. C. 274. *Obichini v. Bligh*, 8 Bing. 351.

(2) By Lord Ellenborough, *Cavan v. Stewart*, 1 Stark. N. P. C. 525.

(3) *Becquet v. M'Carthy*, 2 B. & Ad. 958.

(4) *Douglas v. Forrest*, 4 Bing. 693. It was noticed that Lord Ellenborough, in *Buchanan v. Rucker*, appeared to have considered that a person having property

in the island, was virtually present, and that in *Cavan v. Stewart*, Lord Ellenborough said, "You must prove him summoned, or, at least, that he was once in the island of Jamaica when the attachment issued."

(5) *Malony v. Gibbons*, 2 Camp. 503. It is presumed, that the judgment would only furnish *prima facie* evidence of the fact of appearance by attorney. Lord Ellenborough said, in this case, that he would look to foreign judgments with great jealousy.

justified in allowing greater latitude in the examination of foreign judgments, upon which actions are brought, than in the instances before mentioned. It would apparently be attended with inconvenience, if the defendant were to be at liberty to exercise all the privileges of a new trial; and that, according to a different law and different rules of evidence. Besides it may frequently, perhaps generally, be difficult to bring forward a second time the merits as formerly laid before the foreign Court, owing to the distance of places, and the loss of witnesses and vouchers. And though a jury, under proper direction, might possibly make due allowances on account of these circumstances, yet it seems to militate against the *comitas gentium*, to expose the people of foreign nations, and even our own colonies, to this risk, and to the expense attendant on such an investigation. (1)

Judgment,
when conclu-
sive.

Although it should be held, that where an action is brought upon a foreign judgment, it is open to review in the same manner as if a new trial were granted, still it seems not to follow, that, in all cases, a foreign judgment should be open to examination on other grounds than that of palpable errors in the face of it, want of jurisdiction, or fraud. It may be said, that no sovereign is, by the law of nations, bound to execute within his dominions a sentence pronounced out of it. He may, therefore, impose terms upon the execution of the sentence, and reserve a right to examine into its merits. But if a foreign judgment has been pronounced by a court of competent jurisdiction, and the losing party institutes a new suit upon the same matter, it seems contrary to the principles of general jurisprudence, that the merits should be subjected to a second inquiry. And the same principle seems to preclude an examination into a foreign judgment, which has been executed, by payment, or the vacating of securities. (2)

(1) The argument, that foreign judgments ought not to be conclusive, has sometimes been rested on the ground, that the judgments of inferior Courts in England are not so, see *Walker v. Witter*, Doug. 1.

Per Buller, J., in *Galbraith v. Neville*, 1 Doug. 5, n. It may be doubted, whether this ground is satisfactory. *Vide supra*, *Judgments of inferior Courts*.

(2) It must be observed, that this

In the case of *Burrows v. Jemimo*, (1) the acceptor of a bill residing at Leghorn, having been discharged of his acceptance, according to the laws established there, by the failure of the drawer, instituted a suit there, and had his acceptance vacated by a decree of the Court: being afterwards sued in England upon the same bill, he applied to the Court of Chancery for an injunction, which was granted on the broad ground, that the sentence of a Court of competent jurisdiction is conclusive. Where a covenant had been made by the defendant to indemnify the plaintiff from all debts due from a late partnership, subsisting between the plaintiff the defendant and a third person, and from all suits on account of non-payment, proof was given on the part of the plaintiff, that proceedings had been instituted in a foreign court against the late partners for the recovery of a partnership debt, and that a decree passed against them for want of an answer, (in consequence of which a sequestration issued against the estate of the plaintiff, and he was obliged to pay the debt); the decree was held to be conclusive, in an action on the covenant against the defendant, who was a party to the foreign suit, and who having notice ought to have appeared and made his defence, and the defendant was not allowed to shew that the proceedings were erroneous. (2)

In considering the proceedings of a Colonial Court, the Courts of this country look at their substance and not at their

Form of judgment.

subject is left by the authorities in great uncertainty. Eyre, Ch. J., lays stress on the circumstance, that where a judgment is voluntarily submitted, by the party who claims the benefit of it, to the jurisdiction of the Court, there is not the same ground for it's being conclusive. It, however, could scarcely be contended, that the judgment was merely *prima facie* evidence for a party who endeavoured to recover the debt, but that it was conclusive in his favor when he used it by way of set off. On this subject, *vide supra*, *Judgments of inferior Courts*.

(1) Str. 733.

(2) *Tarleton v. Tarleton*, 4 M. & S. 21. Bailey, J., took a narrow

ground for his opinion, that, as between the parties to the suit, the justice of it might be again litigated, but as against a stranger it could not. The case of *Novelli v. Rossi*, 2 B. & Ad. 757, *Supra*, seems an authority for examining foreign judgments, which are erroneous upon the face of them, in cases where an action is not brought upon the judgment. In that case, the foreign suit had been instituted by the party seeking to use it, and strangers had been parties to the foreign suit. In the case of *Buchanan v. Rucker*, 9 East, 191, where the foreign judgment was avoided for want of notice, it was set up by the defendant.

form; for it has been said that few foreign judgments could be sustained, if the same accuracy in them were required, as in our own. (1) But a foreign judgment will not be an estoppel in this country, if it do not appear to be final and conclusive as an estoppel in the country, where it is pronounced. (2) An action will not lie upon a decree of a foreign Court of Equity, where the sum due on the decree is left indefinite. (3) But if the decree be perfected, as by stating a balance due upon partnership accounts, an action may be maintained on the decree. (4)

Irish judgment. In the case of *Guinness v. Carroll*, (5) the Court of King's Bench expressed doubts as to the point, whether the grounds of an Irish judgment were examinable. Lord Tenterden said, "Assuming that this Court, as has been contended, can inquire into the consideration of a judgment like that declared on, and that, on principles of general justice, we ought not to give it effect, if it has been unduly obtained, still I am of opinion, that this has not been made apparent." The argument in the case turned on the point, whether a judgment in Ireland has the same effect as a judgment of a Court of Record in England.

Practice of nations.

The general doctrine, maintained in the American Courts, is, that foreign judgments are *prima facie* evidence, but that they are impeachable. But to what extent this doctrine is to be carried does not seem to be definitively settled. It has been declared, that the jurisdiction of the Court may be inquired into,

(1) Per Lord Tenterden, in *Henley v. Soper*, 8 B. & C. 20, where his Lordship states, that this is according to the rule of the Privy Council.

(2) *Plummer v. Woodburne*, 4 B. & C. 36, and see *Obichini v. Bligh*, 8 Bing. 351, where the foreign judgment was not acted upon, because the proceedings were imperfect.

(3) *Sadler v. Robins*, 1 Camp. 253.

(4) *Henley v. Soper*, 8 B. & C. 19.

(5) 1 B. & Ad. 463. The certificate of a Vice-consul is not evidence of the facts stated in it, *Waldron v. Combe*, 3 Taunt. 162. With respect to discharges by foreign bankruptcy, see *Potter v. Brown*, 5 East, 125. *Smith v. Buchanan*, 1 East, 6. *Edwards v. Ronald*, 1 Knapp. Pr. C. 259. *Odwin v. Forbes*, Buck, 57. *Philpots v. Read*, 1 B. & B. 294. *Orr v. Brown*, 5 C. & P. 414. *Sidaway v. Hay*, 3 B. & C. 14. *Phillips v. Allen*, 8 B. & C. 477.

as also it's power over parties and things, and that the judgment may be impeached for fraud. (1)

SECTION IV.

Of Sentences in the Ecclesiastical Courts.

The sentences of Ecclesiastical Courts, though they are not Courts of Record, have generally, at least where they are in the nature of proceedings *in rem*, a conclusive effect; and that, as regards persons who are not parties to the proceedings. But where they are not of this nature, they are conclusive only as between parties to the suit. (2) They are not admissible to prove matters which are not expressly adjudicated, but only inferred from the decision.

In various instances it is part of the law, which binds the temporal Courts, that the state or legal character, conferred on a person by the Ecclesiastical Courts, shall give him certain rights, and subject him to certain liabilities. To divest or exempt him from these, recourse must be had to an original suit in the Ecclesiastical Court.

Exclusive jurisdiction.

Legal character.

Thus a probate is the only legitimate evidence of personal property being vested in an executor, or of the appointment of an executor; the original will is not admissible for that purpose. (3) Payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate,

Executor.

(1) See Story, on the Conflict of Laws, ch. xv. in which the subject of the present chapter is treated of with great ability, and with more general views than is consistent with the plan of the present work. Also Kent's Commentaries, Lecture xxvii. See *ib.* the practice of the French tribunals upon this subject.

(2) The necessity for pleading sentences in the Ecclesiastical Court, by way of estoppel, has not been much considered, nor, indeed, their effect as between parties to a suit, where they would not be conclusive as to all the world.

(3) *Coe v. Westernam*, 2 Sel. N. P. 730. *Pinney v. Pinney*, 8 B. & C. 335.

though the probate be afterwards declared null and void. (1) Though a person has not been party to a suit respecting the granting of a probate, he is not admitted to prove that another person was appointed executor, or that the testator was insane, (2) or that the will was forged.

A party may shew that a probate is forged, because such evidence supposes that the Spiritual Court has given no judgment: (3) and he may shew, that the particular Spiritual Court granting probate had no jurisdiction under the circumstances; as, that the supposed testator was still alive, or that he left *bona notabilia*.

Husband and
wife.

It was said by the Chief Justice of the Common Pleas, in delivering the opinions of the Judges in the *Duchess of Kingston's* case, that although a sentence of nullity of marriage, or in affirmance of marriage, or in suits upon a promise of marriage, (4) or for jactitation of marriage, had been received in civil causes, yet that the parties to the suit, or at least the parties against whom the evidence was received, were parties to the sentence and had acquiesced under it, or claimed under those who were parties or had acquiesced. (5) But it should seem, that these observations had reference to cases

(1) *Allen v. Dundas*, 3 T. R. 150.

(2) 1 Lev. 236.

(3) T. Raym. 404; 1 Sid. 359; B. N. P. 247; 5 Rep. 30; 1 Lev. 236. *Allen v. Dundas*, 3 T. R. 125. That letters of administration are revoked, B. N. P. 247. On the want of jurisdiction, see *Betsworth v. Betsworth*, Style, 10. 12 Vin. Ab. 128.

(4) See *Da Costa v. Villa Real*, Str. 961, where a sentence in a suit, upon a contract of marriage, was held conclusive in an action for damages.

(5) 11 St. Tr. 261; 20 Howell, 538. In *Robins v. Crutchley*, 2 Wils. 124, in a writ of dower, where the question was, whether the plaintiff had been married to an ancestor of the defendant, it

was considered, that the plaintiff could not conclude the defendant by a sentence affirming the plaintiff's marriage, in a suit to which the plaintiff's alleged husband was no party. But it was said, that the sentence was evidence. It is to be observed, however, that the suit was one for divorce, and that the marriage was determined upon plea. The sentence was not a proceeding *in rem*: it did not originally confer any legal character. It is difficult to conceive, upon what principle it could even be admitted in evidence against a stranger. The same remarks apply to the mode, in which the sentence as to the marriage was obtained, in the jactitation suit in the *Duchess of Kingston's* case.

where the proceeding in the Ecclesiastical Court had not been a proceeding *in rem*, and where the question of marriage had been only incidentally determined; and that where the object of the suit has been directly to deprive a person of the legal character of husband or wife, by virtue of the exclusive jurisdiction of the Ecclesiastical Court, that the sentences of nullity of marriage or of divorce, in like manner as probates and letters of administration, have the effect of establishing conclusively the state and legal character of parties for and against all the world. (1)

The fact of the legality of a marriage, arising incidentally in a civil suit, may be determined in modern proceedings at least, without referring the question to the spiritual Judge; though upon issue joined in dower upon the fact of legality of marriage, the bishop's certificate is the appropriate evidence, and is conclusive. (2)

The questions of difficulty, which have arisen respecting the effect of sentences in the Ecclesiastical Courts, relate to the point whether, in fact, an Ecclesiastical Court has already determined a matter, which can only in such Court be the subject of a direct suit or proceeding *in rem*, but which has incidentally become the subject of controversy in a civil suit.

Sentence conclusive of what.

One of the principal rules, applicable to cases where a sentence of a Spiritual Court is adduced in proof of a fact in issue in a Temporal Court, is, that the sentences of Courts of Justice are not evidence of any collateral matter which may possibly be collected or inferred from them by argument. (3) Thus a sen-

Matters inferred.

(1) See Bunting's case, 4 Co. 29, where the husband of the first marriage was bound by a sentence of divorce, though no party to the suit. Kean's case, 7 Co. 41. Hatfield v. Hatfield, Str. 961. Jones v. Bow, Carth. 225. Harvey's case, 11 St. Tr. 235. In the case of Hildyard v. Grantham, cited by Lord Hardwicke, 2 Ves. 246, Rep. temp. Hard. 311, *supra*, the Court held, that a sentence of excommunication for incontinency was inadmissible, on an issue to try a question of legitimacy, upon one

ground, that it was *res inter alios acta*; but they held, that if it had been a sentence on the point of marriage, in a question on the lawfulness of the marriage, it might have been given in evidence. As to the effect of sentences of deprivation, see Phillips v. Crawley, Freem. 84, pl. 103; 12 Vin. Ab. 128. As to right of pew, Cross v. Salter, 3 T. R. 639.

(2) Per Lord Loughborough, Ilderton v. Ilderton, 2 H. Bl. 156.

(3) Per Lord Holt, in Blackham's case, 1 Salk. 290. By Chief Jus-

Jactitation suit. tence of jactitation of marriage only imports, that it did not appear that the parties were married at a particular time and place, and not that there was no marriage at any time or place. The cause is ranked as a cause of defamation, unless when the defendant pleads a marriage. The sentence has a negative and qualified effect, namely, that the party has failed in his proof, and that the libellant is free from all matrimonial contract as far "as yet appears," leaving it open to new proofs of the same marriage in the same cause, or to any other proofs of that or any other marriage in another cause. It is no plea to a new suit in the Ecclesiastical Court.

Accordingly, in the *Duchess of Kingston's* case, (1) on a charge of bigamy, where a sentence in a Spiritual Court, in a cause of jactitation of marriage, was offered as conclusive evidence to disprove the second marriage, the Judges held, that this sentence (even admitting it to be evidence on a criminal prosecution) could not be conclusive, but that the sentence and judgment of the Lords might well stand together, and both propositions be true. The sentence would only prove, that it did not then appear, that the parties were married; but, because the Court had not then sufficient proof of the marriage specified, it could not be inferred, that there was no marriage between them at any other time or place. (2)

tice Eyre, in the *Duchess of Kingston's* case, 11 St. Tr. 261. 20 Howell, 538. In several of the decisions on this subject, the point determined was, that the sentence was not *conclusive* as to matters of inference; but it would seem, to be the proper conclusion from the authorities, that the sentence is not *admissible* evidence as to such matters.

(1) 11 St. Tr. 261. 20 Howell, 538. The sentence in the jactitation suit not being a proceeding *in rem*, but arising only upon plea, would seem not to have been admissible evidence, except between the parties to the suit, even if it had been an adjudication of the precise point in issue. A sentence in a proceeding for incontinency has been rejected as evidence against a

child of the marriage claiming by descent, *Hilliard v. Phaley*, 8 Mod. 180; but upon a more questionable ground, *viz.* that such proceedings could not affect the title to lands.

(2) In *Jones v. Bow, Carthew*, 225, a sentence of nullity in a cause of jactitation was not only admitted, but deemed conclusive, and, as it would seem, in favor of a stranger to the suit in the Ecclesiastical Court. And the Chief Justice of the Common Pleas, in delivering the opinion of the Judges in the *Duchess of Kingston's* case, observes, that a sentence in a jactitation suit had been admitted in evidence upon the trial of an ejectment. The sentence was, however, used against a party to the suit in the Spiritual Court.

The principles applicable to this subject are explained by Chief Justice Holt, in *Blackham's* case. That was an action of trover, and the plaintiff proved that certain goods had been in his possession, which had been taken away by the defendant. The defendant shewed, that these were the goods of a deceased woman, and that he had taken out administration; upon which the plaintiff proved, that the deceased some days before her death was married to him. The defendant contended, that the Spiritual Court, in granting the letters of administration to him, must have assumed that there was no such marriage. Lord Holt, C. J., ruled, that the sentence of the Ecclesiastical Court was conclusive only, where a matter had been directly determined by the sentence; but that was to be intended only in the point directly tried. It was otherwise, if a collateral matter be collected or inferred from the sentence; as in that case, because the administration was granted to the defendant, it was inferred, that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point then tried had been married or unmarried, and their sentence had been not married. (1)

Inference from probate.

Where indeed the sentence of the Spiritual Court, determining the state and legal character of a person, is not a sentence arising out of an adverse suit between parties, there can be no reasonable ground for allowing it any further effect than that of establishing the rights and liabilities incident to such state and legal character. Thus letters of administration, which have been granted to a person as administrator of A. B. deceased, are not legitimate proof of A. B.'s death. (2) It appears to be settled, notwithstanding a prior decision to the contrary,

(1) *Blackham's* case, 1 Salk. 290. It did not appear that there had been any suit in the Ecclesiastical Court concerning the right to letters of administration, in which the plaintiff and defendant were parties, and in which the question of the marriage had been determined, Hargr. Law Tracts, p. 451.

(2) *Thompson v. Donaldson*, 3 Esp. 63. The probate of a Will devising real property is not evi-

dence of the contents of such Will, see B. N. P. 245. *Doe d. Ash v. Calvert*, 2 Camp. 389. *Hoe v. Nathorp*, 1 Lord Raym. 154. *St. Leger v. Adams*, *ib.* 731. *Dike v. Polhill*, *ib.* 744. *Rex v. Netherseal*, 4 T. R. 258. *Hume v. Rundall*, 6 Madd. 331. The probate is not evidence as to copyholds, *Jervoise v. Duke of Northumberland*, 1 J. & W. 570.

that the probate of a will is not, at least, conclusive evidence of its validity, on an indictment for the forgery of the same will. (1)

Between parties.

It would seem, however, that, between the parties to an Ecclesiastical suit, any point, expressly determined, would be admissible evidence in a civil suit, notwithstanding the sentence did not confer or take away any legal character, and notwithstanding it was not a sentence upon the main object of the suit, but upon some subordinate matter raised in the pleadings. Cases of this nature have not been much considered in the civil Courts. (2)

Criminal suits.

It has been stated, that the sentence of an Ecclesiastical Court, directly upon a point within its peculiar jurisdiction, is not, as in civil cases, conclusive on the same matter coming incidentally into question in a criminal suit. Thus, the Chief Justice of the Common Pleas, in delivering the opinion of the Judges in the *Duchess of Kingston's* case, observes, "Proceedings in matters of crime, and especially of felony, fall under a different consideration from civil suits; first, because the parties are not the same,—for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine witnesses, or in any manner intervene, or appeal; secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. The ground of the judicial powers, given to Ecclesiastical Courts, is merely of a spiritual consideration, *pro correctione morum et pro salute animæ*. They are, therefore, ad-

(1) *Rex v. Gibson*; *Rex v. Buttery*; S. P. R. & R. Cr. Ca. 342, 343, n., overruling *Rex v. Vincent*, 1 Str. 481, other grounds are assigned for the judgment. It would seem not to be *prima facie* evidence.

(2) *Vide supra*, the observations of the Chief Justice in the *Duchess of Kingston's* case, who appears to have stated the necessity for the mutuality of parties, where the proceeding is in *rem*, too broadly.

dressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The Temporal Courts alone can expound the law, and judge of the crime and its proofs; in doing so they must see with their own eyes and try by their own rules, that is, by the common law; it is the trust and sworn duty of their office."

It may be observed, that the particular Ecclesiastical proceeding, to which the observations of the Chief Justice in the *Duchess of Kingston's* case are applied, was not a proceeding *in rem*, and had not for its direct object the investing or divesting a person of any particular state and legal character, but the question of marriage was only decided upon a plea to a suit for defamation. The point is of less importance with regard to sentences in direct matrimonial suits, as it is expressly provided by the statute 9 G. 4, c. 81, s. 22, that the penalties of bigamy shall not extend to any person who, at the time of his second marriage shall have been divorced from the bond of his first marriage, or to any person whose former marriage shall have been declared void by any Court of competent jurisdiction.

With regard to the cases of *Rex v. Gibson* and *Rex v. Buttery and M'Namara*, (1) which decide that the probate of a will is not, at least, conclusive evidence, that the will has not been forged upon an indictment for the forgery; it is not necessary to rely in their support upon the principles stated by the Chief Justice in the *Duchess of Kingston's* case. In any criminal proceedings for stealing property, a probate, it is conceived, would be conclusive as to the right of an executor; but the fact of obtaining probate seems irrelevant to a charge for the means used to obtain it, except by inference, which, it has been seen, is not a legitimate use to be made of judicial sentences.

(1) *Supra*, p. 548, R. & R. Cr. Ca. 342, 343, n.

Fraud.

Judgments of the Ecclesiastical Courts, like all other judicial acts, may be impeached by evidence of fraud or collusion, and such evidence was adjudged to be admissible, on the part of the prosecution in the case of the *Duchess of Kingston*, who was tried for bigamy. (1) It was observed in that case, that fraud was an extrinsic collateral act, which vitiated the most solemn proceedings, and that Lord Coke had said that it avoided all judicial acts ecclesiastical and temporal; and that although it was not permitted to shew that the Ecclesiastical Court was mistaken, it might be shewn that it was misled.

A distinction, in this respect, has been made between the case of a stranger, (who cannot come in and reverse the judgment, and therefore of necessity he must be permitted to aver that it was fraudulent) and the case of a party to the proceedings; the party himself cannot give evidence of fraud, but must apply to the Court, which pronounced the judgment to vacate it. Thus, in the case of *Prudham v. Phillips*, (2) where the defendant proved her marriage with one M., in answer to which a sentence of an Ecclesiastical Court was produced, to which sentence she was a party, showing that she was at the time married to another person, Chief Justice Willes, after much debate, refused to allow the defendant to prove, that the sentence had been obtained by fraud.

SECTION V.

Of Judgments of Courts of Admiralty; Judgments in rem in the Exchequer; Judgments by Commissioners, Visitors, Trustees, Courts Martial, Arbitrators, Justices, &c.

It has been seen, that the sentences of Spiritual Courts are not, in general, examinable, when they determine, by their exclu-

(1) 11 St. Tr. p. 262. Per Lord Hardwicke, 2 Ves. 246.

(2) Ambler, 763, cited by the

Lord Chancellor from a MSS. note of Serjt. Parker.

sive authority, the state and legal character of individuals. In like manner the judgments about to be noticed, being judgments of Courts of exclusive jurisdiction, are, in general, conclusive in the Superior Courts of common law. It seems to be a part of the general law of the land, that the determinations of such Courts, in the absence of fraud and collusion, are constituted as the sole criterion of those rights which are subjected to their jurisdiction.

With respect to Courts of Admiralty, it was observed by Lord Mansfield, that the nature of the question of *prize* excludes the jurisdiction of the common law Courts; that the views of a prize Court could not be answered in any Court in Westminster Hall; and, therefore, that the Courts of Westminster Hall never attempted to take cognizance of the question, *prize or no prize*, not from the locality of the thing being done at sea, but from their incompetence to embrace the whole of the subject. (1) The subject has been considered in this country principally with reference to the decisions of foreign Courts of Admiralty, which are treated of in another section of the present chapter.

Courts of Admiralty.

A judgment of condemnation in the Court of Exchequer, where proceedings *in rem* have been instituted, is conclusive evidence in any other Court, as to all the world, that the goods were liable to be seized. (2) The jurisdiction of the Court of Exchequer, in this case, is not only competent, but sole and exclusive; and though no formal or express notice is given to the owner of the goods in person, yet he has sufficient notice to try the point of forfeiture, by the seizure of the property, by the proclamations according to the course of the Court, and by the writ of appraisement.

Judgment of condemnation in the Exchequer.

A record of condemnation for adulterating spirits is evidence between other parties; but a record of conviction for

(1) In *Le Caux v. Eden*, 2 Doug. 614, n.

(2) *Scott v. Shearman*, 2 Black. Rep. 979. By Lord Kenyon, Ch.

J., in *Geyer v. Aguillar*, 7 T. R. 696. Bull. N. P. 244. See also the cases cited in 5 Price, 202.

penalties, which is a proceeding *in personam* not *in rem*, is of a different nature, and subject to the same rules as other judicial proceedings. In an action, therefore, for the price of spirits, where the defence was that the spirits had been adulterated, such record of conviction has been held not to be admissible as proof of the adulteration. (1) The Court of Exchequer decided in the case of *The Attorney General v. King*, (2) that a record of condemnation of goods, proceeding upon one act of parliament, is not evidence with respect to the commission of an offence charged under another act. And Mr. Baron Wood held, (3) in the same case, that the record, if admissible at all, could not be admitted as proof of any immaterial allegation, which might be contained in the record. (4)

Acquittal.

An acquittal in the Exchequer was considered by Lord Kenyon, in the case of *Cooke v. Sholl*, (5) to be conclusive evidence of the illegality of the seizure. That was an action of trover for several pipes of wine seized by the defendant for want of a permit. At the trial of the cause, the plaintiff gave in evidence a record of acquittal in the Court of Exchequer. The defendant then insisted, that, under the circumstances of this case, the permit had expired before the seizure was made; and Mr. Justice Heath, who tried the cause, was of that opinion; but on it's being suggested, that there had been a different determination in the Court of Exchequer, he reserved the point for the opinion of the Court of King's Bench, with liberty to enter a verdict for the defendant, if it should be adjudged for him. When the case came before the Court, Lord Kenyon thought the record of acquittal precluded all reasoning on the construction of the permit; but as the question respecting the judgment of acquittal was not upon the record, and the only question was on the construction of the permit, a verdict was entered for the defendant. This case, therefore, has not determined, that an acquittal in the Exchequer would be conclusive evidence of the illegality of a seizure, al-

(1) *Hart v. M'Namara*, 4 Price, 154, in note, by Gibbs, Ch. J.

(2) 5 Price, 195.

(3) 5 Price, 211.

(4) See *ante*, c. 2, s. 1.

(5) 5 T. R. 255, and see a case in 12 Vin. Ab. (A. b. 22), pl. 1, before Price, B., *Acc.*

though certainly that appears to have been the opinion of Lord Kenyon. It may be observed, that an acquittal does not, like a conviction, ascertain any precise fact. The sentence might have proceeded on the ground, that sufficient evidence was not produced, on the part of the crown, to warrant the seizure; and though the sentence may be conclusive as against the crown, it seems reasonable, that it should not have such a conclusive operation, in an action for seizing the property, against a third person, who was not a party with the crown in the original proceedings, and had no notice or opportunity for supporting the condemnation.

It has been decided in several cases, that a judgment of condemnation by commissioners of excise, in a matter exclusively within their jurisdiction, is conclusive, on the right of seizure coming into question in any other Court. (1) Where a statute provides that the judgment of commissioners, appointed by the act, shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding. It has therefore been held, that a certificate from commissioners for settling the debts of the army, stating that so much was due from the defendant, (an army agent,) to the plaintiff (an officer,) was conclusive in an action brought to recover the money; and that no evidence could be received, to show that the commissioners had formed a wrong judgment. (2)

Commissioners.
Excise.

Army.

The same principle is applicable to tribunals of a private nature, as where founders of colleges, or persons creating any trust, confer on certain individuals, whether visitors or trustees, the exclusive power of determining the rights of persons seek-

Visitors.

(1) *Terry v. Huntington*, Hardr. 480. *Fuller v. Fotch*, Carth. 346. *Roberts v. Fortune*, before Lee, Ch. J., 1742. 1 Harg. Law Tracts, 468, n. 1 Ridg. Ir. T. R. 1. 2 Evans' Pothier, 307. The doctrine in *Henshaw v. Fleasance*, 2 Bl. Rep. 1174, that the judgment of the Court of Excise could not have that effect, because it was not a Court of Record, is at variance with

general principles, and the current of authority as to this particular Court.

(2) *Moody v. Thurston*, 1 Str. 481, ruled by Pratt, Ch. J.; and a new trial afterwards refused by the whole Court. See also *Lane v. Hegberg*, Bull. N. P. 19. *Earl of Radnor v. Reeve*, 2 Bos. & Pull. 391. *Brown v. Bullen*, 1 Doug. 407.

ing a benefit under the donation or trust. The Courts of Common Law receive the determinations of the visitors or trustees as the criterion of the rights of the parties. A mandamus to restore the fellow of a college has been frequently refused. (1) In the case of *Phillips v. Bury*, it was decided, on an appeal to the House of Lords, that a sentence of deprivation, by the visitor of a college, acting within the limits of his visitatorial jurisdiction, was conclusive evidence in an action of ejectment for one of the college estates; and the judgment of the Court of King's Bench, which had been given on the opinions of three Judges, against the opinion of Lord Holt, was reversed. (2) In another case on this subject, which was a prosecution for an assault, in turning out of a college one who had been expelled, the Court of King's Bench determined, that evidence, impeaching the sentence of expulsion, had been properly rejected at the trial. (3) But the sentences of visitors may be impeached for excess of jurisdiction. (4)

Trustees.

In an action of ejectment against a schoolmaster, removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it was held that it was not necessary for the lessors of the plaintiff to prove the grounds of the sentence, and that it was not competent for the defendant to disprove them. (5)

Courts martial.

The Mutiny Acts have created certain Courts invested with authority to try those who are a part of the army or navy, the object of the trial being limited to breaches of military or naval duty. It seems that the sentences of these Courts are conclusive in any action brought in the Courts of Common Law; but that, in like manner as regards other Courts of exclusive jurisdiction, the Courts of Common Law will examine

(1) *Dr. Wedrington's case*, 1 Lev. 23; *Dr. Patrick's case*, 1 Lev. 65; *case of New College*, 2 Lev. 14.

(2) *Phillips v. Bury*, Skin. 447. 1 Lord Raym. 5, S. C. 2 T. R. 346, S. C.

(3) *Rex v. Grondon*, Cowp. 315.

(4) See *Rex v. Bishop of Chester*, 1 W. Bl. 22. That the sentence will not be impeached for informality or irregularity, *Bishop of Ely v. Bentley*, 1 W. Bl. 85.

(5) *Doe v. Haddon*, 3 Doug. 310.

whether Courts Martial have exceeded the jurisdiction given to them. (1)

It is probably on the ground that the jurisdiction of arbitrators is an exclusive jurisdiction created by the parties, that it has not been contended, as in the case of judgments of inferior Courts, that their awards are open generally to review, or that it was necessary before the new rules, to plead them by way of estoppel. (2) It is, however, competent to shew that an arbitrator has proceeded without jurisdiction. (3)

Arbitrators.

It may be proper in this place briefly to advert to the doctrine, that a person acting as Judge (that is, where he has over the subject matter and over the person a general jurisdiction which he has not exceeded,) will not be liable to have his judgment examined in an action brought against him. (4) It will not, however, be necessary to examine the law upon this subject at any length, because the sentence of the Judge, when used on such occasions, considered with reference to the law of evidence, is only produced for the purpose of shewing that what was done was a judicial act. The questions which ordinarily arise upon the production of the sentence, are, whether the subject of the sentence was within the jurisdiction of the

Action against Judge.

(1) See *Grant v. Gould*, 2 H. Bl. 69. *Ship Bounty*, 1 East, 313; *Stratford's case*, 1 East, 313. *Mann v. Owen*, 9 B. & C. 595.

(2) *Doe d. Morris v. Rosser*, 3 East, 15. *Dunn v. Murray*, 9 B. & C. 780. *Whitehead v. Tattersall*, 1 Ad. & E. 491. It cannot be shewn that the arbitrator has proceeded on a mistake, see *Johnson v. Durant*, 2 B. & Ad. 931. *Ash-ton v. Poynter*, 1 Cr. M. & R. 738. Nor can the award be impeached at *ex parte* for corruption, *Wells v. Maccarmick*, 2 Wils. 148. *Brad-dick v. Thompson*, 8 East, 344. *Brasier v. Bryant*, 3 Bing. 167.

(3) *Rex v. Washbrook*, 4 B. & C. 732.

(4) As to Judges of Record, see *Hammond v. Howell*, 1 Mod. 184. *Garnett v. Ferraud*, 6 B. & C. 611.

Mostyn v. Fabrigas, Cowp. 172. *Dr. Bonham's case*, 8 Co. 114. *Gren-ville v. Barwell*, 1 Ld. Raym. 454. *Per Holt, Ch. J.*, 1 Ld. Raym. 470. *Basten v. Carew*, 3 B. & C. 694. *Lumley v. Quarle*, 2 Ld. Raym. 767. As to Judges not of Record, *Ecclesiastical Judge, Ackerley v. Parkinson*, 3 M. & S. 411. *Com-missioners of Court of Requests, Aldredge v. Haines*, 2 B. & Ad. 395. *Returning Officer at Election, Ashby v. White*, 2 Ld. Raym. 941. *Cullen v. Morris*, 2 Stark. 577. *Harman v. Tappenden*, 1 East, 555. *Ministerial Officers, Marshalsea case*, 10 Co. 76. *Moravia v. Sloper, Willes*, 30. *Parker v. Williams*, 3 B. & A. 330. *Justices of the Peace*, per Lord Tenterden, in *Basten v. Carew*, 3 B. & C. 653. *Mills v. Collett*, 6 Bing. 85.

Judge, and whether the sentence was pronounced in a regular manner. When these preliminaries are ascertained, the effect of the sentence depends upon principles, which do not belong to the law of evidence. (1)

SECTION VI.

Of Proceedings in Chancery.

Decree.

A decree in the Court of Chancery may be given in evidence on the same footing, and under the same limitations, as the verdict or judgment of a Court of Common Law. (2) It should seem that the decree of a Court of Equity, fixing the balance of a partnership account, would be enforced in a Court of Law; but an action at common law is not generally maintainable upon a decree of a Court of Equity for a specific performance, the decree in equity merely ascertaining that a party is under equitable obligation to pay money. (3)

On a trial touching the right to lands, decrees in Chancery

(1) Cases of apparent want of jurisdiction; Conviction for more than one penalty on same day, *Crepps v. Durden*, Cowp. 540. Payment of wages, *Branwell v. Penneck*, 7 B. & C. 536. Time of commitment unreasonable, *Davis v. Capper*, 10 B. & C. 28; *Hill v. Bateman*, 1 Str. 710. Committal without complaint, *Morgan v. Hughes*, 2 T. R. 225. Excess of imprisonment, *Groome v. Forrester*, 5 M. & S. 314. Cases where the excess of jurisdiction was only apparent by extrinsic evidence, *Terry v. Huntington*, Hardr. 480. *Hill v. Bateman*, 2 Str. 710. *Welsh v. Nash*, 8 East, 402; 1 Br. & B. 409; 12 East, 67, 82. *Per Le Blanc, J.*, *Fuller v. Cotch*, Carth. 346. *Lowther v. Lord Radnor*, 8 East, 113. *Strickland v. Ward*, 7 T. R. 634, n. *Gray v. Cookson*, 16 East, 23. Cases as to the statement of facts giving jurisdiction

being conclusive, *Brittain v. Kinnaird*, 1 B. & B. 432, 442. *Basten v. Carew*, 3 B. & C. 649. *Fawcett v. Fowles*, 7 B. & C. 394. Informal convictions, *Rogers v. Jones*, 3 B. & C. 409. *Daniell v. Philipps*, 1 Cr. M. & R. 662. *Wickes v. Clutterbuck*, 2 Bing. 483. *Massey v. Johnson*, 12 East, 67. *Bridget v. Coyney*, 1 M. & R. 211. *Gimbert v. Coyney*, M'Cl. & Y. 469.

(2) *Vide supra*, sect. 1. B. N. P. 243. It appears from Co. Litt. 260, that the Court of Chancery is not strictly a Court of Record. The opinions, therefore, as to the sentences of all Courts not of Record being examinable, would seem to require qualification, even if these opinions be confined to sentences which are not in the nature of proceedings *in rem*.

(3) *Henley v. Soper*, 6 B. & C. 20. *Carpenter v. Thornton*, 3 B. & A. 52.

between other parties concerning the same lands were held admissible in evidence, to shew the character in which the possessor enjoyed the lands. With respect to the objection that they were *res inter alios gestæ*, it was observed, that this reason was not conclusive against their admissibility; for, in actions against the sheriff for an escape, it is usual to give in evidence judgments against third persons, in order to shew the character in which the plaintiff claims, and the amount of damage which he has sustained. (1)

The subject of the admissibility of bills in Chancery, for the purpose of proving matters of pedigree by the allegations contained in them, has been considered in a former part of this Work. (2) A question has arisen, whether a bill in Chancery may be received against the complainant, on the principle of it's being an admission made by him. The authorities are contradictory upon this subject, but it seems to be the more prevalent opinion, that a bill in Chancery cannot be used for this purpose, on the ground that the facts stated in a bill are frequently the mere suggestions of counsel, made for the purpose of obtaining an answer upon oath by the defendant. (3) A bill in Chancery, however, is proper evidence to shew the existence of a judicial proceeding, and that certain facts were in issue between the parties, in order to introduce the answer, depositions or decree.

A demurrer in Chancery does not admit the facts charged in the bill; for if the demurrer be overruled, the defendant may still go on and answer. So if the defendant pleads; for the plea only amounts to a statement, that, supposing the facts charged to be true, the defendant is not bound to answer. Demurrers, therefore, and pleas in Chancery are not evidence against the party demurring, or pleading the facts charged in

(1) *Per Tindal, Ch J.*, in *Davies v. Loundes*, 1 Bing. N. C. 607.

(2) *Vide supra*, p. 231.

(3) See B. N. P. 235. *Snow v. Phillips*, 1 Sid. 221. *Gilb. Ev.* 42. *Woollett v. Roberts*, 1 Ch. Ca. 64.

Banbury Peerage case, from MSS. in 2 Selw. N. P. 685.

(4) *Lord Ferrers v. Shirley, Fitz.* 9, 196. B. N. P. 235. *Doe d. Bowerman v. Sybourn*, 7 T. R. 3. 1 Wightw. 325.

the bill, in a future action between the parties to the Chancery suit.(1)

Answers. The authorities, respecting the admissibility and effect in evidence of answers in Chancery, have been noticed in treating of the subject of admissions. (2) The subject of depositions in Chancery will be considered in connection with other species of depositions in the next section.

Depositions.

It is difficult to lay down general rules applicable to the admissibility and effect of verdicts, judgments, decrees, or sentences of whatever description, when used for the particular purposes of terminating, limiting, or influencing controversy by the authority of a *res judicata*. Some progress has been made towards accomplishing this object in the judgment of Chief Justice De Grey, on a question referred to the Judges in the prosecution of the Duchess of Kingston. The general principles there laid down are as follows:—

“From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable;

(1) *Tomkins v. Ashley*, Mo. & M. 32.

(2) *Vide supra*, as to taking the

whole answer together, and as to the effect of an answer in Chancery against parties and privies.

nor of any matter to be inferred by argument from the judgment.

“It is certainly true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person, who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties, and all claiming under them, are not in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons; but as they are not applicable to the present subject, it is unnecessary to state them.

Again, “Although a direct and decisive sentence is to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet all acts, though of the highest judicial authority, are impeachable from without: although it is not permitted to shew that the Court was mistaken, it may be shewn that it was misled.”

The observations of Chief Justice De Grey, are in consonance with the present practice of the Courts in regard to the obvious propriety of confining the effect of judicial decisions (unless in excepted cases) to persons who are parties or privies to the proceedings; and in regard to matters coming collaterally in question, incidentally cognizable or inferred by argument from a decision; in regard also to decisions obtained by fraud or collusion. But it will be seen, by reference to the preceding sections, that the principles laid down by the Chief Justice present a very inadequate, and in some measure an incorrect view of the state of the law upon this important subject. It does not appear that the decisions of Courts of concurrent and of exclusive jurisdiction have the same effect in evidence; and it is certain that the former, at

least, are not "as evidence, conclusive." The difficulties of the subject relate principally to distinctions between the sentences of Courts of Record or superior Courts, and of Courts not of record or inferior Courts, but of concurrent jurisdiction, and also to the sentences of foreign Courts. A material distinction, both with regard to domestic and foreign sentences, appears to exist, according as their operation is *in rem*, or *in personam*. It will probably be thought, that the law upon these subjects has not hitherto attained such a degree of uniformity, as to admit of being reduced to a few plain and general principles; though, in regard to each particular description of sentences, it has been endeavoured, in the preceding sections, in some measure to accomplish this object.

SECTION VII.

On Depositions.

Principle of admission.

Depositions, as generally used, are a species of evidence of a secondary character, to be adduced, where the *vivâ voce* examination of the deponent is not attainable. They differ from ordinary hearsay evidence in the circumstances, that they are taken upon oath, and that the deponent has been subjected to the cross-examination of the person against whom they are used, or of some person standing in relation of privity with him. There is a strong presumption also, from the course of official duty, that depositions are faithfully recorded. But depositions are subject to great defects. For the demeanor of the deponent, which is a principal criterion of the truth of his statement, is not subjected to the observation of the jury; the powers of cross-examination are often restricted; and where, as in most instances is the case, the previous inquiry has been private, it wants the best safeguard against falsehood or equivocation, which belongs to judicial investigations. (1)

(1) The testimony of a witness at a former trial depends on the same principles, and is subject to the same rules, as depositions. The

cases on the subject will be noticed incidentally in the present section.

In order that the proper effect of depositions may be collected, the party reading them must read the answers to the cross-interrogatories as part of his case. (1) Depositions in Chancery are not in general receivable without proof of the bill and answer, (2) except where they are read under an order of the Court of Chancery, (3) or for the purpose merely of contradicting a witness. (4) A party cannot abandon part of a series of interrogatories; he must abandon the whole, if any, (5) even though the answers refer to or state the contents of writings not in themselves evidence. (6)

Entire deposition.

The effect of giving a deposition in evidence is a complete substitution for the evidence of the witness, whose deposition is used. Therefore the deposition of an attesting witness to a will who is deceased, dispenses with the necessity of calling a surviving witness to prove the execution of the will. (7)

Effect in evidence.

It is proposed to consider, in the first place, the judicial character of depositions; secondly, their character as affecting particular individuals; and lastly, their admissibility as primary or secondary evidence.

In order that depositions may be admitted in evidence, it is necessary that they should appear to have been obtained in the course of a judicial proceeding. (8)

Judicial proceeding.

(1) *Timperley v. Scott*, 5 C. & P. 341.

(2) B. N. P. 240; *Gilb. Ev.* 62, unless where they are ancient, *Gilb. Ev.* 64. *Byam v. Booth*, 2 Price, 234. Answers to lost interrogatories may be read as admissions, though some of the answers are unintelligible of themselves. *Rowe v. Breton*, 8 B. & C. 765.

(3) *Palmer v. Lord Aylesbury*, 15 Ves. 176.

(4) See *Highfield v. Peake*, 1 M. & M. 110.

(5) *Wheeler v. Atkins*, 5 Esp. 246.

(6) *M'Intyre v. Layard*, R. & M. 903. *Falconer v. Hanson*, 1 Camp. 171. *Vide supra*, as to hearsay statements, in answers in Chancery, p. 363. It is too late to take

an objection to a deposition, on the ground of the interest of a witness, after cross-examination, *Ogle v. Paleski*. *Holt's N. P. C.* 485; or to leading questions, after publication, *Williams v. Williams*, 4 M. & S. 497. Where depositions have been taken to perpetuate testimony, and the witness becomes a party to the suit, his deposition cannot be read. *Tilley's case*, *Lord Raym.* 1009.

(7) *Wright v. Doe d. Tatham*, 1 Ad. & E. 3. It was held, in the same case, that the circumstance of the bill having been dismissed could not affect the admissibility of the evidence.

(8) B. N. P. 241. *Stork v. De-nen*, 12 Vin. Ab. Ev. A. b. 31, pl. 16.

Thus a voluntary affidavit, though made before an officer of the superior Courts, is not receivable in evidence. (1) Nor are depositions, made before magistrates, receivable, in cases where they are not required to take them. (2)

Depositions in
Equity.

Depositions in Courts of Equity are written examinations of witnesses, taken by the officers of the respective Courts of Equity, or by commissioners appointed for the purpose. In order that the depositions may be considered as regularly taken under the authority of a Court of Equity, it must appear that they were obtained in a suit, which was regularly before the Court, and within its jurisdiction. But if a bill in Equity be dismissed, merely because the Court considered the matter unfit for Equity to decree, the depositions may still be given in evidence. Thus, where a bill of reviver is brought, in a case where a bill of reviver does not lie, there cannot regularly be any depositions. (3) But where, upon a bill to perpetuate testimony, the cause is set down for hearing, and the bill is dis-

(1) Bac. Ab. Ev. 628; Styl. 446; B. N. P. 242, unless by way of admission. Besides the want of jurisdiction, it would be another objection to the evidence, that the party, sought to be affected by it, had no opportunity to cross-examine.

(2) As before the late statute, upon charges of misdemeanor, *Rex v. Paine*, 5 Mod. 163; *Ld. Raym.* 730; on an information for a libel, It is there said, that depositions before magistrates are not evidence in indictments for misdemeanors, or civil actions, or appeals. The Court, however, appears to have decided the case, chiefly on the ground that the defendant had not, in fact, examined the witnesses; see by Lord Kenyon, in *Rex v. Eriswell*, 3 T. R. 713. It seems that depositions before magistrates, in cases of treason, are not admissible, because, it is said, that high treason is not within their commission; though another reason has been assigned from the statutes of treason, see 2 Hale, 286. Radburne's case, 1 Leach, 461, n.C

where the Judges are stated to have been of opinion, that the statutes of Philip and Mary did not extend to treason; *Foster's Discourses*, 337; 1 Hale, 305, 306. Where depositions are taken in a proceeding which is voidable and not void, it seems that they are evidence; *Murray v. Wise*, cited 1 Str. 309. Though depositions on charges of treason are not directed to be taken by statute, yet they seem to fall within the principle on which depositions in felony are received, if the magistrate be authorized to take them, and especially if it be his duty to do so. The distinction consists in the statute prescribing a more formal mode of taking the depositions in cases of felony, and providing for their being transmitted to the proper Court. As to *ex parte* examinations of paupers before the late Poor Law Act, see *Rex v. Nuneham Courtenay*, 1 East, 373. *Rex v. Ferry Frystone*, 2 East, 54. *Rex v. Abergwilly*, *ib.* 63. *Rex v. Eriswell*, 3 T. R. 725.

(3) *Backhouse v. Middleton*, Ch. a. 175. *Gilb.* 56.

missed, because it ought not to have been so set down, the plaintiff will, at law, have the benefit of the depositions which have been obtained. (1)

Depositions in the Ecclesiastical Courts, when taken in a cause over which those Courts have jurisdiction, appear to be admissible, on the same principle as other depositions taken in the course of a judicial proceeding. (2) There are, however, some authorities against the depositions in Ecclesiastical Courts being admissible evidence in trials before Courts of Common Law. (3) But they appear, for the most part, to be founded on the doctrine, that depositions are only admissible in evidence, when taken in Courts of Record; a doctrine, which does not seem to be supported by satisfactory reasons, and which, it must be admitted, does not by any means universally hold. (4)

Depositions before magistrates and coroners on the bailment or commitment of persons charged with felony, used to be taken

(1) *Hall v. Hoddesden*, 2 P. Wms. 162. *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316, where a bill is dismissed for want of equity. *Moyser v. Peacock*, 12 Vin. Ab. Ev. 31, pl. 15. *Smith v. Veale*, 12 Vin. Ab. Ev. A. b. 31, pl. 41; *Ld. Raym.* 735; and see further, as to the admissibility of depositions, *Copeland v. Stanton*, 1 P. Wms. 414. *Jones v. Dunthorpe*, 1 Dick. 50. *Mulvany v. Dillon*, 1 Ball. & Be. 411. *Lord Cholmondeley v. Clinton*, 2 Mer. 81; *Ch. Ca.* 175; 3 *Ch. Rep.* 72.

(2) Chief Baron Gilbert says, that "depositions in the Spiritual Courts may be read, when taken in a cause in which those Courts have authority, as far as relates to that cause, inasmuch as they are lawful oaths, and a man may be indicted for the violation of them, though they be not oaths in a Court of Record." *Ev.* p. 60. He further observes, that "depositions taken in the Spiritual Courts, in a cause relating to lands, cannot be read, because they are no oaths at all.

(3) *Earl of Sarum v. Sir B. Spen-*

cer, 2 Roll. Abr. 679, pl. 5. *Litt. Rep.* 167; *March. Rep.* 120, even by consent; *B. N. P.* 242; *Bac. Ab. Ev.* 628; *Gilb. Ev.* 60; *Vin. Ab. Ev. A. b.* 31; 1 *Hawk. c.* 42; *Vin. Ab. Ev. A. b.* 31; see 2 *Hale*, 285; *Welsh's case*, where the objection appears to have been against proceedings by the civil law, and also that the deponent was interested. In the time of the earlier reports, there was a great jealousy between the temporal and spiritual Courts, upon the subject of their jurisdictions, which may account for many observations of the Judges upon this subject.

(4) Depositions in Chancery are not of record. In *Breedon v. Gill*, 1 *Ld. Raym.* 219, 222; *Salk.* 555, Lord Holt expressed an opinion, that depositions before Commissioners of Excise might be read before the Commissioners of Appeals. In 2 *Hale*, 52, 285, however, it is stated as a reason for receiving depositions upon criminal charges before magistrates, that they are Judges of Record.

in pursuance of the statutes 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 16. They are now taken under the statute 7 G. 4, c. 64, which repeals the two earlier statutes. The second section of the statute 7 G. 4, c. 64, enacts, that, "the two Justices of the Peace, before they shall commit to bail, and Justice or Justices, before the committing to prison, shall take the examination of the person arrested for felony, or on suspicion of felony, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and such Justices and Justice respectively shall subscribe all such examinations, informations, bailments, and recognisances, and deliver, or cause the same to be delivered, to the proper officer of the Court in which the trial is to be, before or at the opening of the Court."

Depositions in
case of mis-
demeanor.

The third section of the same statute gives a power of taking informations in cases of misdemeanor, which had not before been given. It enacts, that, "every Justice of the Peace, before whom any person shall be taken on a charge of misdemeanor or suspicion thereof, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison, or require bail from the person so charged; and shall subscribe all examinations and informations, and deliver or cause the same to be delivered to the proper officer of the Court, in which the trial is to be, before or at the opening of the Court, in like manner as in cases of felony."

Depositions in the case of criminal charges before magistrates become evidence upon the general principles before stated; the effect of the statutes, in rendering the evidence admissible, being that of giving it the stamp of being taken in the course of a judicial proceeding. The objects of the legislature in the statutes referred to appear to have been, to enable the Judges to see, whether a prisoner had been properly admitted to bail, or is entitled to be bailed; and whether the witnesses

were consistent in their story. Nothing is said in the acts as to any alteration in the law of evidence. Some inconvenience arises from the state of the law upon this subject; because, upon a preliminary investigation, a principal object of which is the discovery of evidence, not only against the person charged, but against all who may be implicated in an offence, it may be expedient to admit testimony of a kind which would be very improper upon a final inquiry concerning the guilt or innocence of a prisoner. Besides, the evidence of the witnesses is seldom properly sifted by cross-examination before the magistrate, who has even the power of excluding professional advisers from the preliminary inquiry, in consequence of its peculiar nature and objects. (1)

With respect to depositions taken before a coroner, the fourth Coroner. section of the 7 G. 4, c. 64, enacts, that "every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the act, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material; and shall certify and subscribe the same evidence, and also the inquisition before him taken, and deliver the same to the proper officer of the Court, in which the trial is to be, before or at the opening of the Court." Depositions before coroners are admissible in evidence upon the same principle as depositions before magistrates. (2) They derive an additional sanction also from the circumstance, that they must have been taken in a Court to which the public have access. (3)

(1) That an attorney is only permitted to be present as a matter of courtesy, *Rex v. Borron*, 3 B. & A. 432. *Cox v. Coleridge*, 1 B. & C. 37. See *Rex v. Staffordshire Justices*, 1 Chet. 218. *Collier v. Hicks*, 2 B. & Ad. 663.

(2) Depositions before the coroner held to be admissible by all the Judges, in *Lord Morley's case*, Kel. 55; 6 *Howell's St. Tr.* 770. 776; *Harrison's case*, 12 *Howell's St. Tr.* 851; 2 *Hale*, 284; *Gilb. Ev.* 120; *Thatcher's case*, *Sir T. Jones*,

50; *Bromwich's case*, 1 *Lev.* 180.

(3) By *Lord Kenyon*, Ch. J., in *Rex v. Eriswell*, 3 T. R. 707; 4 *Comm.* 274; 1 *Hale*, 60; *Rex v. Scorey*, *Leach*, 50. It has been said, that the coroner is of greater authority than justices, and that this was a reason for admitting depositions taken before him, which would not be admissible if taken before justices, *Thatcher v. Waller*, 2 *Jon.* 53. It seems, however, that this doctrine is not founded on any legal principle.

Informal depositions.

In order to render a deposition taken before a magistrate admissible in evidence as a judicial proceeding, it is necessary that the forms of the statute should have been complied with. This subject is particularly illustrated by the decisions in which it has been held, that the examinations of prisoners informally taken cannot be read in evidence, but that in such cases parol evidence may be given of the examination, and the informal examination may be used for the purpose of refreshing memory. (1)

The statute 7 G. 4, c. 64, requires, that the depositions of witnesses examined before a magistrate shall be taken in writing. The presumption is always, that the magistrate has done his duty, and has reduced the deposition into writing. Supposing it proved that he has not done so, or that he has not reduced the whole deposition into writing, still it is conceived, that parol evidence would be inadmissible on the part of the prosecution. It is unlike the case of a prisoner's examination, which, if it loses its judicial character, is nevertheless the subject of oral testimony. A deposition, on the other hand, if it be not admissible as a judicial proceeding, seems to possess no other character, in which it can be received. (2)

(1) *Vide infra, Secondary Evidence and Confessions.* Most of the questions concerning the informality of examinations have turned on the points, whether they have been acknowledged, and whether they have been signed by the prisoner. There is some confusion in Lambe's case and the early authorities, in speaking of the effect of the examinations as recorded in a judicial document, and when considered as a confession at common law. The principal authorities are Lambe's case, 2 Leach, 552; Laver's, 16 Howell, 215; Jones's, 2 Russ. on Crimes, 658, n.; Dewhirst's, Lewin, 47; Thomas's, 2 Leach, 637; Bennet's, 2 Leach, 553; Telicote's, 2 St. Ca. 484. It seems, that according to the more recent practice, it is usual, where the examination has not been signed by the prisoner, not to receive it in evidence, but to allow it to be used for the purpose of refreshing memory, Pressley's case,

6 C. & P. 183. Where the prisoner has merely put his mark, it must be proved that the examination was correctly read over to him. The practical effect of the examination in either case is very much the same. In Farrant's case, 6 C. & P. 102, where no charge of felony was specified, and it was not stated that the magistrates who signed the examination were acting as magistrates, the examination was rejected as a judicial document, but was allowed to refresh memory. Perhaps this may be considered an authority of some practical importance, that a deposition would, under similar circumstances, be altogether rejected. In *Rex v. Reed*, Mo. & M. 403, in the case of an irregular examination taken by a coroner, he was allowed to state the examination from memory.

(2) See *Fearshire's case*, 1 Leach, 202; *Harris's case*, 1 Mo. Cr. Ca. 338; *Rex v. Thornton*, Warw. Spr.

It is not essential to the validity of depositions, that they should have been signed by a deceased witness. (1) But the new act requires the Justices or Justice to subscribe the examinations and informations, and the Coroner to subscribe the evidence given before him.

When several depositions had been taken before a magistrate, but only one was produced at the trial, *Hullock, B.*, refused to receive it, although it was the only one which was taken in writing, on the ground that those which were not produced might be in favor of the prisoner. (2) The correctness of this decision may, however, be doubted, as the only deposition taken agreeably to the statute had been duly returned. It is the duty of a magistrate to return all the depositions duly taken against a prisoner, and not merely the depositions of those whom he thinks proper to bind over as witnesses. (3)

A magistrate is not bound to return all that is stated by the witnesses on a charge of felony, but only so much of it as is material to the case. But it is incumbent on magistrates to be very careful in exercising any discretion upon this subject, as circumstances, apparently minute and irrelevant, may frequently, in the progress of a trial, become highly important, especially as regards the contradiction of a witness's testimony. (4)

Lord Holt in *Breedon v. Gill*, (5) was of opinion that depositions before commissioners of excise, (who, by statute 12 Car. 2, c. 24, have power to administer oaths on inquiry into

Ass. 1817, by Holroyd, J. That parol evidence is admissible to add to the examination of a prisoner, *Rex v. Harris*, 1 Mo. Cr. Ca. 338. Interlocutory remark of prisoner, *Rex v. Spilsbury*, 7 C. & P. 187. Where an examination purported to have been taken on oath, parol evidence was not allowed to be given that, in point of fact, it was not taken on oath, *Rex v. Rivers*, 7 C. & P. 177. It did not appear

that the magistrate was called to disprove his own misrepresentation.

(1) *Flemming's case*, 2 Leach, 854, prosecution for rape.

(2) *Pearson's case*, Lewin, 97.

(3) *Rex v. Fuller*, 7 C. & P. 269.

(4) *Rex v. Coveney*, 7 C. & P. 667. *Rex v. Thomas*, 7 C. & P. 817.

(5) 1 Ld. Raym. 219.

forfeiture,) taken in the presence of the other party, and signed by the witness, would be admissible on an appeal from the sentence of the commissioners, in case the witness should be dead at the time of hearing the appeal.

Depositions
under statutes.

Depositions may be taken under the authority of several acts of parliament, enacted principally with a view of providing against the deficiencies of evidence in civil suits, where the witnesses are abroad, or about to leave the kingdom, or are infirm and unable to attend at a trial. (1) Depositions are also frequently taken by consent in civil suits, and occasionally upon prosecutions for misdemeanors. (2)

Depositions
affecting parties.

Secondly, with regard to the character of depositions as affecting particular individuals.

It is a general rule, that evidence which a witness has given on a trial, between parties upon the same subject matter is admissible between the same parties on a subsequent trial, if the witness has died in the interim. (3) But it is in general, essential, that the party to be affected by the evidence of depositions, or some person in privity with him, should have had an opportunity of cross-examining the witnesses, with reference to the same subject matter. (4)

(1) See stat. 1 Will. 4, c. 22. *Ducket v. Williams*, 1 Cr. & J. 510, witness residing out of jurisdiction. *Pond v. Dimes*, 3 M. & Scott, 161, as to depositions taken in consequence of illness, see *Abraham v. Newton*, 8 Bing. 274. The statute does not apply to indictments, *Rex v. Briscoe*, 1 Dow. P. C. 520. See also statutes 13 Geo. 3, c. 63; 42 Geo. 3, c. 85.

(2) *Rex v. Morphey*, 2 M. & S. 602, information for a misdemeanor, for illegally transacting the sale of military commissions. *Anon.* 2 Chit. 199, prosecution for perjury.

(3) *Rex v. Jolliffe*, 4 T. R. 290. *Shutt v. Bovingdon*, 5 Esp. 56. *Mayor of Doncaster v. Day*, 3 Taunt. 262. *Pyke v. Crouch*, 1 Ld. Raym. 750 (5th resolution), *vide supra*, p. 353, where this sub-

ject is treated of as regards parol testimony delivered on a former trial.

(4) "The rule of the common law is, that no evidence shall be admitted, but what is, or might be, under the examination of both parties; and it is agreeable also to common sense, that what is imperfect, and, if I may so say, but half an examination, shall not be used in the same way as if it were complete." By Lord Ellenborough, in *Carenove v. Vaughan*, 1 M. & S. 6. Per De Grey, Ch. J., *Duchess of Kingston's case*, 20 Howell, 538. Per Hullock, B., *Attorney General v. Davison*, M'Cle. & Y. 169; Hardr. 215, 472; 2 Jones, 164; Wils. 214, 215; Hob. 155; 2 Roll. Ab. 679; 1 Vern. 413; B. N. P. 242. Depositions taken before Commissioners of Bankrupts, being *ex parte*,

It is an established rule, that depositions made before magistrates, upon charges in which they have authority to take them, are not receivable in evidence, if it appear that they were taken in the absence of the prisoner. Where a magistrate, at the request of overseers, visited a person who had received a mortal wound, and, in the absence of the prisoner, took her examination upon oath, and reduced it into writing, it was held by Eyre, Ch. B., that such an examination was not admissible as a deposition, inasmuch as the prisoner had no opportunity of contradicting the facts it contained. (1) In the case of *Rex v. Forbes*, (2) a constable, who produced a deposition, stated that the prisoner was not present during the time that a part of the deposition, (standing before that which was distinguished by a cross,) was being taken down; but that he was afterwards introduced, and was present during the time when the remaining part of the deposition was taken down, and the whole was then read over to him: Chambre, J., refused to receive that part of the deposition which stood before the mark.

Absence of prisoner.

But a deposition was held to be admissible, though the greater part of it was reduced into writing during the prisoner's absence; it appearing, that the witness was afterwards re-sworn in the prisoner's presence, and that the deposition was then read over, and stated by the witness to be correct, and that the prisoner was then asked, if he had any questions to put. (4)

Witness re-sworn.

were not evidence before the statutes, 5 G. 2, c. 30, s. 41; 49 G. 3, c. 121, s. 10; 6 G. 4, c. 16; B. N. P. 242; 1 Lev. 180; Ld. Raym. 220; 2 Jones, 53. *Janson v. Wilson*, Doug. 244. *Bowles v. Langworthy*, 1 T. R. 366; 2 Roll. Ab. 679; B. N. P. 242. *Ex parte* depositions taken before Barrack Commissioners, under 47 G. 3, c. 1, held inadmissible, in *Atty. General v. Davison*, 1 M. & Y. 160. *Ex parte* depositions before Commissioners of Inquiry not allowed as evidence to expunge a creditor's proof, *ex parte* Coles, Buck. 242; Cooke's B. L. 552, 8th ed. *Ex parte* Campbell, 2 Moore, 51.

(1) Woodcock's case, 1 Leach, 500. On the authority of which

decision, Douglas's case, 2 Leach, 561, was determined. The examination was admitted as a dying declaration, *vide supra*, Callaghan's case, M'Nally, 385.

(2) Holt's C. 598.

(3) *Rex v. Smith, R. & R. Cr. Ca. 339*; 2 Stark. Ca. 208. It was objected, that the prisoner had not the opportunity of seeing the manner in which the whole evidence was delivered. And the language of Chambre, J., in *Rex v. Forbes, supra*, countenances this objection. Indeed, it is difficult to reconcile the two decisions. It may be thought, that the observation of the demeanor of the witness must be less important to a prisoner than to a Judge or jury; for he does

Absence of
prisoner.
Coroner.

With respect to the admissibility of depositions, taken before a Coroner in the absence of a prisoner, the authorities appear to be in favor of such evidence being admitted; they are, however, not very satisfactory. (1) It may be thought that the hearsay evidence of persons who have not been subject to cross-examination, may, in the generality of instances, be more calculated to mislead juries than to guide them to the truth. But, on the other hand, the presence of the public, may be considered as a considerable check upon witnesses in the absence of cross-examination. As far as the judicial nature of the inquiry is important, it appears to be as regular for the Coroner to take the depositions in the absence of the prisoner, as it is for a Justice to take the evidence in his presence. (2) But

not require such means of ascertaining, whether the witness is speaking truth or falsehood.

(1) B. N. P. 242. It is to be observed, that in this book, though it is of considerable authority, numerous principles, particularly upon the subject of evidence, are laid down, which are clearly not law in the present day. Judge Buller states, as the reason for admitting the evidence, that "the coroner is appointed on behalf of the public;" a reason which applies equally to justices. In *Rex v. Eriswell*, 3 T. R. 713, it seems that several of the observations of Lord Kenyon and Mr. Justice Buller, in favor of admitting depositions taken in the absence of a prisoner, were intended by them to apply equally to those taken before justices as those taken before coroners. In *Rex v. Eriswell*, Lord Kenyon refers to the reason given for the decision, in *Paine's case*, as reported, 5 Mod. 163, that the defendant had lost the benefit of a cross-examination; and he calls it a *weighty* reason. In *Harrison's case*, a deposition was admitted, which appears to have been taken in the absence of the prisoner. Two depositions were read in this case, and it would seem, that it may be inferred from them, that the prisoner was not present when the first was taken, 12 St. Tr. 853. The pri-

soner was not defended by counsel. In the case of *Rex v. Purefoy*, a deposition taken in the absence of the prisoner was admitted, after an objection taken by the prisoner's counsel. Before Hotham, B., Maidstone Sum. Ass. *Peake's Ev.* 68, n. cases cited by Buller, J., in *Rex v. Eriswell*, and his work on the law of *Nisi Prius*, do not appear to be strictly applicable, *viz.* *Bromwich's case*, 1 Lev. 180. *Thatcher v. Waller*, T. Jones, 53, and *Kelyng*, 55; and he cites *Radburne's case* as an authority, that depositions upon criminal charges are evidence, though the prisoner were absent. But it appears from the report of *Radburne's case*, in *Leach*, that the prisoner was present, 1 Leach, 459. It may be observed, that the early authorities in Crown law, which bear against the prisoner, especially where the points have been decided, in political trials, ought to be regarded with much suspicion.

(2) By the statute of Philip and Mary, the justices are required to *take the examination of the prisoner, and the information of those that bring him*; but the injunction upon the coroner, is to *put in writing the evidence given to the jury before him*. And although the inference from the different wording of these repealed enactments may not be very cogent, yet it is to be observed, that, as the coroner's inqui-

although an inquiry by the Coroner in the absence of the prisoner be a judicial proceeding, and required by the duty of his office, yet there seems no satisfactory reason, why it should not be confined to its proper objects, or why the depositions should be received under circumstances which render every other kind of depositions taken judicially inadmissible, except by express statutory provision.

A. being seised of two closes, which he claimed as heir at law, conveyed one to B., and both A. and B. were afterwards ousted by C.; they afterwards brought actions of ejectment against him for the premises respectively, which they recovered. B. was again dispossessed by C., and again brought ejectment against him, claiming the same premises as in the former action, and by the same title. On the trial B. offered to prove the deposition made by a witness since deceased, upon the trial of the former ejectment between A. and C.; it was held, that the evidence was inadmissible. (1) It appears to have been held, on an issue from Chancery between A. and B., that depositions produced by B. in Chancery, in a suit of C. against B., were inadmissible; but the principle of this decision may, perhaps, be questioned. (2)

Want of privacy.

Depositions of deceased witnesses, taken before commissioners of bankrupt on the opening of a commission, and subsequently enrolled by the assignees afterwards appointed, have been held not to be admissible evidence in an action brought by the

sition must be *super visum corporis*, it commonly happens that the person who did the act is unknown, or if known, that he contrives to avoid apprehension before the inquisition is held. It seems expedient, that it should be a principal object, with such preliminary inquiries, to collect evidence.

(1) *Doe d. Foster v. Earl of Derby*, 1 Ad. & E. 790. It was said, that the *Earl of Bath v. Bathersea*, 5 Mod. 9, was not reported clearly enough to be acted on. It was also observed, that although it had been laid down, that a verdict was evidence, where it was for one under whom any of the present parties

claim, that must mean a claim acquired through such party subsequently to the verdict.

(2) *Atkins v. Humphreys*, 1 M. & Ro. 523, Chief Justice Tindal said, "that he was inclined to think that he could not receive the evidence, on the ground of want of reciprocity, and rejected it." The question appeared to be the same in the two suits, and it may be questioned, whether the doctrine of reciprocity was applicable to this case, which related to the admissibility of a deposition, and not of a verdict. The party had not only a power of cross-examining, but actually used the deposition.

bankrupt against the assignees acting under the commission. It was observed, that the assignees had no opportunity to cross-examine the witnesses at a meeting which is strictly private, and that the witnesses are supposed to be produced by the petitioning creditor, who has often an interest adverse to that of the assignees. (1)

Mutuality of parties.

Although it has been seen that verdicts are not admissible as evidence of a *res judicata*, unless there be a complete mutuality of parties, for the reason, principally, that other evidence might have been admissible, if the parties had been in any way changed, yet this reason does not apply to the deposition of a witness against a person who had full power of cross-examination. In the case of *Wright v. Doe d. Tatham*, (2) where, in a suit in Chancery an issue of *devisavit vel non* was ordered, in which the defendants in Chancery were plaintiffs, and the plaintiff in Chancery was defendant, respecting the execution of a will, the issue was found in the affirmative: at the trial of the issue one of the three attesting witnesses to the will swore to it's execution: the plaintiff in Chancery afterwards brought an action of ejectment on his own demise, as heir at law of the testator, against one of the defendants as devisee under the will; it was held, that the evidence of the witness given on the former occasion was, after his death, admissible at the second trial. It was noticed by the Court, that the defendant at the second trial was on the first occasion joined with other plaintiffs, and that the defendant on the first occasion, was, on the second, only lessor of the plaintiff. But it was said, that the lessor of the plaintiff was the real party in an action of ejectment, and that in the former action the present lessor of the plaintiff had precisely the same power of objecting to the competency of the witness, the same right of cross-examination, and of calling witnesses to discredit or contradict his testimony on both occasions. (3)

(1) *Chambers v. Bernasconi*, 1 Cr. M. & R. 352.

(2) 1 Ad. & E. 3.

(3) It perhaps may be questioned, whether he could have called all the same witnesses for the

purpose of contradiction. See the rule as laid down in Vin. Ab. Evidence, A. b. 31, pl. 47, "depositions in a former cause, where either plaintiff or defendant were parties, may be read against such

And although the parties are the same, yet if the same matters were not in issue in the former cause, the depositions are not evidence. (1) This rule holds, at least, where the depositions are not offered as evidence of reputation; for in that case the very circumstance, that the same matter was litigated, is an objection to the evidence. Same matter.

Where the previous inquiry concerned the same transaction with that under investigation, it does not appear to be essential, that the object of it should have been identical. This, at least, has been held with respect to depositions before magistrates. Thus, a deposition has been held admissible upon a charge of murder, although it was taken upon the occasion of the prisoner being charged before the magistrate with an assault on the deceased, and a robbery of the manufactory which he was employed to guard; (2) the two charges in fact relating to the same transaction. This case was decided principally on the authority of *Radburne's case*, (3) where the deposition of a deceased person was read in evidence upon a trial for murdering her. Indeed, if it were necessary that the charges should be identical, it would exclude the depositions of the deceased in all cases of homicide. In such cases, it is, perhaps, not to be presumed, that the witness's deposition would have been varied by the cross-examination of the prisoner, if he had been charged before the magistrate with the precise offence for which he was afterwards tried. Same transaction.

Upon the ground of the absence of an opportunity for cross-examination, it has been held, with respect to Chancery Depositions, that if a witness, after being examined *de bene esse*, dies before the defendant puts in his answer, the deposition cannot Opportunity for cross-examination.

plaintiff or defendant." But in *Rushworth v. Lady Pembroke*, Hardr. 472. B. N. P. 239, it is said, that a person shall not take advantage of a deposition, who was not a party to the suit; "for as he cannot be prejudiced by the deposition, he shall never receive any advantage by it." The true question, however, seems to be, whether

there is a probability that the cross-examination would have varied, if the parties had been the same as in the subsequent suit.

(1) *Allibone v. the Attorney General*, Vin. Ab. Ev. A. b. 31, pl. 46.

(2) *Rex v. Smith, R. & R.*, C. C. 340. 2 Stark. C. 208.

(3) 1 Leach, 457.

be read; for the opposite party would not, in that case, have an opportunity of cross-examination. (1) And although an answer be put in, yet if the witness, examined *de bene esse*, die before he can be examined again, having been sick from the time of putting in his answer until his death, which prevented his going to be examined, the witness's deposition will not be admissible. (2) But where, upon a bill to perpetuate testimony, the defendant stood in contempt, and would not answer, and thereupon the plaintiff had a commission and examined witnesses *de bene esse*, and the defendant joined in the commission, and cross-examined some of the witnesses produced for the plaintiff, and, before the answer came in, the witnesses died, their depositions were held receivable upon the trial of an ejectment. (3)

Where a party has had an opportunity of cross-examining a witness, and has neglected to do so, the case is the same in effect as if he had cross-examined. For, as it has been observed by Lord Ellenborough, "otherwise the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not; which would be a most uncertain and unjust rule." (4) Upon this principle, where a person filed a bill in Chancery for the examination of a witness *de bene esse*, to which the defendant did not put in an answer,

(1) Dutton v. Colt, Sir T. Raym. 335, n. Ford v. Guy, cited in Howard v. Tremaine, 1 Show. 363. Piercy v. —, 2 Jones, 165. B. N. P. 240. Vin. Ab. A. b, 31, pl. 12, 22. "The rule is, that depositions are not allowed to be read before answer put in, or before the party is in contempt, unless he has had an opportunity for cross-examining." By Le Blanc, J., in Carenon v. Vaughan, 1 M. & S. 8. With respect to the practice of Courts of Equity, in allowing such depositions to be read in certain cases, Gilb. Ev. 57, 58. 2 Jones, 164. It is said that an order in Chancery, requiring such evidence to be admitted, does not bind the common law courts. 2 Jones, 164. B. N. P. 240. Gilb. Ev. 57.

(2) Brown's case, Hardr. 315; the case of Arundel v. Arundel, Ch. R. 90. 12 Vin. Abr. A. b. 31, pl. 8, which is contrary, does not appear to be tenable.

(3) Howard v. Tremaine, 1 Shower, 363. Gregory, J., expresses himself as deciding on the ground of the cross-examination, Carth. 265. 1 Salk. 278.

(4) In Carenove v. Vaughan, 1 M. & S. 6. The abstaining from cross-examining affords also a presumption of the acquiescence in the statement of the witness. And bills to perpetuate testimony would be altogether frustrated, if the adverse party refused to answer till all the witnesses were dead; See Howard v. Tremaine, Carth. 265.

and an order of the Court of Chancery was afterwards obtained for the examination of the witness, and notice of the order and interrogatories which it was intended to put, was given to the defendant, and an order for the publication of the evidence was afterwards obtained, it was held, that the deposition was admissible evidence upon a trial at *nisi prius*. (1) It was said by Chief Baron Gilbert, that if the adverse party is in contempt, then the depositions of the witnesses shall be admitted, for then it is the fault of the objector, that he did not cross-examine the witnesses, since he would not join in the examination. (2)

In cases where hearsay evidence is admissible, it is obvious that there can be no reason why depositions, regarding matters of general reputation, should have been taken, in suits in which the party to be affected by them, or any one whom he represents, were concerned. (3) The principal questions as to the admissibility of depositions in such matters, are, whether they

Privy not required.

(1) *Carenove v. Vaughan*, 1 M. & S. 6. The witness had left town the next day after his examination for a foreign country; but it was said by the Court, that if the defendant had wished to cross-examine, he might have prayed time of the Court of Chancery. And Lord Ellenborough observed, that as an order for the publication of the depositions had afterwards been obtained, against which the defendant had unsuccessfully attempted to shew cause, it must be presumed that the Judge, before he issued the order for publication, must have been satisfied that the adverse party had all the liberty to cross-examine, which the practice of the Court requires. Depositions of witnesses examined without service of the order for liberty to do so, cannot be read; *Mulvany v. Dillon*, 1 Ball & Be. 413.

(2) *Gilb. Ev.* 56, 62, 64. 4 Mod. 146. *Com. Dig. Ev. C. 4*. And see by *Le Blanc, J.*, in *Carenove v. Vaughan*, 1 M. & S. 8, that depositions are admissible against the

adverse party who is in contempt, and see *dictum* in *Brown's case*, Hardr. 315. 12 Vin. Abr. 109, pl. 23. B. N. P. 240. In a case, where, upon a bill to perpetuate testimony, the defendant was in contempt and would not answer, and the plaintiff had a commission, and examined witnesses *de bene esse*, and the defendant joined in the commission, and cross-examined some of the witnesses produced for the plaintiff, the depositions were held to be admissible upon a trial at law; but it does not clearly appear, what weight was given in the case to the circumstance of the witnesses having been cross-examined. *Howard v. Tremaine*, Show. 363, 364. Carth. 265. 4 Mod. 147. Salk. 278. 12 Vin. Ab. 110. In *Hamond v. —*, 1 Dick. 50, the deposition of a witness examined after publication was received under the circumstances, one of which was that he had been cross-examined.

(3) B. N. P. 260.

have been made *post litem motam*, and whether the character of the parties, whose depositions are tendered, is proved to have been such as is purported on the face of the depositions. This subject has been considered in treating of hearsay evidence. A deposition taken in a cause between other parties will be admitted to contradict what the same witness swears at a trial. (1)

Exceptions by statute.

In some particular cases a peculiar effect is given to depositions by statute. Thus, under the Statute of Bankruptcy 6 G. 4, c. 16, s. 90 & 92, depositions in bankruptcy are made conclusive in certain cases. And by the statute 2 & 3 W. 4, c. 114, s. 7, depositions in bankruptcy are made evidence in certain cases, where the witnesses are dead. By the mutiny acts the *ex parte* examination of a soldier as to his parochial settlement is made evidence in the cause of his death or absence from the kingdom. By the statute 59 G. 3, c. 12, a similar provision is made in regard to the examinations of prisoners as to their settlements. The decisions with regard to these statutes are not here minutely adverted to, as they are not grounded on the general rules of evidence, but relate to the construction of clauses of acts of parliament, limited in their application to particular subjects.

Secondary evidence.

Lastly, several questions have arisen as to depositions being primary or secondary evidence, and as to the circumstances under which, upon the principles regarding secondary evidence, depositions are allowed to be produced.

Witness dead.

A deposition taken before a magistrate upon a charge of felony, or, as it should seem, since the stat. of 7 G. 4, c. 64, upon a charge of misdemeanor, may be given in evidence upon the trial of an indictment, if it be proved to the satisfaction of the Court that the informant is dead, (2) or kept away by the practices of the prisoner. (3) There appears also to be authority for reading

Kept away.

(1) *Sparin v. Dan*, B. N. P. 240.

(2) *1 Hale*, P. C. 305. B. N. P.

242. Though the deceased were

an accomplice; *Westbeer's case*, 1 *Leach*, 12.

(3) *Hamson's case*, 4 *St. Tr.* 492.

the depositions of persons who are unable to attend a trial on account of sickness or other cause, (1) or who cannot be found after diligent inquiry. (2) But it seems that the Courts will not receive the evidence of depositions, whilst there remains any reasonable probability of the witness being forthcoming on a future occasion, in which case the proper course is to move the Court for a postponement of the trial previous to the jury being charged. (3)

Unable to travel.
Not found.

It has been held that a deposition taken in Chancery cannot, without a special order, be read on the ground that the deponent is unable to attend by reason of sickness. (4)

Illness.

Depositions taken on the ground of a witness going abroad

Absence.

Lord Morley's case, Kel. 55. 6 Howell, St. Tr. 776, (examination before the coroner.) In *Thatcher v. Waller*, T. Jones, 53, a distinction was considered to exist in this respect between depositions before Justices and those before a coroner, which does not appear to be founded on any satisfactory principle.

(1) In *Rex v. Eriswell*, 3 T. R. 721, it was considered that for this purpose a person being insane, was equivalent to his being dead; 1 Hale's P. C. 305, inability to travel.

(2) *B. N. P.* 239. *Hawk. P. C.* b. 2, c. 46, s. 18, that the witness has been sought for and cannot be found. It has been held with regard to a witness examined before a coroner, that if he is absent, proof that every endeavour has been made to find him, will not authorize the reading of his examination, Lord Morley's case, Kel. 55. This decision appears to have been thought, by Serj. Hawkins, to have proceeded, on the ground that proper search had not been made; *Hawk. P. C.* b. 2, c. 46, s. 17, 18. And Gilbert, Ch. B., states, that the examination may be read, because, as he supposes, it is to be presumed that the witness is dead, when he cannot be found after the strictest inquiry; *Gilb. Ev.* 138.

(3) *Rex v. Savage*, 5 C. & P. 143. The deponent was unable to

attend the assizes, in consequence of being near her confinement. On the authorities from Lord Hale and Kelyng being cited, Mr. Justice Patteson said, that the point had been doubted, and rejected the evidence. In *Rex v. Hogg*, 6 C. & P. 176, the deposition of an old woman bedridden was allowed to be read, on the ground of there being no likelihood of her being able to attend at another assizes. See *Doe v. Evans*, 3 C. & P. 221, as to depositions in Chancery of a witness unable to attend from illness. And the cases *infra*, as to the proof of instruments, where the attesting witness is ill.

(4) *Doe v. Evans*, 3 C. & P. 221. There are authorities of a contrary tendency. *Luttrell v. Reynel*, 1 Mod. 283. *Kinsman v. Crooke*, 2 Lord Raym. 1166. 1 Atk. 445; *Gilb. Ev.* 54; *B. N. P.* 239; 1 Ves. & Bea. 22. *Jones v. Jones*, 1 Cox, 184. As to reading Chancery depositions, where the witness is kept away by contrivance, *B. N. P.* 243; where he cannot be found, *Benson v. Olive*, 2 Str. 920; where he is not amenable to process, 1 Atk. 445. Lord Altham v. Lord Anglesea, Rep. temp. Holt, 736. It will be observed, that there is a want of modern decisions in Courts of Common Law upon these points.

cannot be read, if the witness be in this country at the time of the trial. Some evidence of the witness having actually gone abroad should be given. (1) Where, however, a witness had actually sailed from this country, but the vessel was in port, having been driven back by contrary winds, it was held that his deposition might be received. (2)

Primary evidence.

In one instance depositions are not used for the purpose of secondary evidence, and that is, where they are produced in order to contradict a witness examined upon a trial. In criminal trials, the depositions may be used for this purpose, either on the part of the prosecution or of the defence. (3)

SECTION VIII.

On Inquisitions.

Inquisitions, nature of.

The last species of judicial writings, upon the admissibility and effect of which it is necessary to advert with any particularity, are inquisitions. These contain the result of inquiries made under competent public authority, concerning matters in which the public are concerned. In some cases, indeed, such inquisitions relate to private affairs, as, for example, the particulars of the estate of a deceased individual, or of his pedigree; still, if the inquiry has been made with a view to ascertain the rights of the crown in regard to such private matters, the inquisition will be of a public nature for the purposes of evidence.

(1) *Proctor v. Lainson*, 7 C. & P. 629. See *Ason*, 1 Chit. 89. *Ward v. Wells*, 1 Taunt. 461. *Fonsick v. Agar*, 6 Esp. 92. *Falconer v. Hanson*, 1 Campb. 171. The subject of this paragraph, and of those immediately preceding, derives considerable illustration from the authorities respecting the dispensing with the attendance of subscribing witnesses.

(2) *Highfield v. Peake*, M. & M.

110.

(3) *Olroyd's case*, R. & R. 88, on the part of the prosecution. *Lambe's case*, 2 Leach, 558. *Staford's case*, 3 St. Tr. 131. *Hawk. P. C. b. 2, c. 46, s. 22*. *Bodle's case*, 6 C. & P. 186, and see the rules laid down by the Judges as to the production of depositions on the part of a prisoner, since the act giving prisoners full defence by counsel.

It has been before observed, (1) that there is an exception to the rule which excludes hearsay evidence, where particular facts have been inquired into or stated by public authority. Whether such an inquiry be founded upon oath, or not upon oath, the principle, upon which the evidence is admitted, appears to be the same. The evidence may be liable to objection, as being of hearsay character, or matter of opinion; and it has not the advantage of having been sifted by the party who is to be affected by it. Nevertheless it is distinguished from other hearsay evidence, by having peculiar guarantees for its accuracy and fidelity. And it may be observed, that, in practice, it is chiefly applicable to subjects beyond the reach of human memory.

Principle of admission.

The inquisitions here treated of are, in general, clearly of a judicial character, and are in many instances the conclusions of juries upon their oaths, or the conclusions drawn by commissioners from evidence taken upon oath. For the sake of uniformity, other public inquiries, not so clearly of a judicial character, are treated of in the present section. The principle of their admissibility appears to be the same.

Whether judicial.

The most ancient inquisition among the records of the country is that of Domesday-book. It contains a general survey of all the counties in England, excepting the four northern, and was compiled soon after the Conquest, for the purpose of ascertaining the ancient demesne lands, which were the *socage tenures*, first in the hands of Edward the Confessor, and afterwards of William the Conqueror; it has been said to have been made with a view to the establishment of tenures. The inquiry was made upon oath before the king's Justices appointed to conduct it. (2)

Domesday-book, nature of.

(1) *Supra*, p. 352.

(2) First Report of the House of Commons on Public Records, App. Sir H. Ellis's preface to Domesday-book furnishes a most interesting guide to its contents and their legal use. See also Spelman's *Gloss. vocæ Domesday*; Reeve's *History of English Law*, vol. 1, p. 219; Kel-

ham's *Domesday*; Grimaldi's *Origines Genealogicæ*. Connected with Domesday-book, are four records called the Exon Domesday, the *Inquisitio Eliensis*, the Winton Domesday, and the Bolden-book. See Cooper on the Public Records, Ch. 7.

Uses of.

Domesday-book is the ultimate criterion for determining, what lands are ancient demesne of the crown; a question of practical importance in the present day, especially in regard to the validity of fines, which have been levied of those lands. (1) Owing to the changes of names since the time when Domesday-book was compiled, such an inquiry is often attended with much difficulty. (2) This inquisition is also occasionally of importance in determining the parcels of manors; (3) the pedigrees of families; (4) the sites of ancient mills; (5) the abbey lands belonging to religious houses, and a variety of other circumstances incident to the proof of immemorial rights and obligations. (6)

Inquisitions
post mortem,
nature of.

Inquisitions *post mortem* form an extensive and valuable source of evidence of the early pedigree of all the great ancient families in the kingdom. They also furnish a variety of particulars, frequently material in the proof of immemorial rights and of titles to estates. These inquisitions appear to have been first taken by the Justices in Eyre, but the duty of taking them was afterwards transferred to the escheators. By the statute 1 Hen. 8, c. 8, it is enacted, that they are to be taken on the oaths of twelve men, and in open places. They

(1) Hob. 188. Gilb. Ev. 69, 76. The trial is said to be by the inspection of Domesday. But it is usual to produce an examined copy from Domesday in evidence, except in proceedings before the House of Lords, where originals are required, if they be in England.

(2) In a trial before Holroyd, J., upon the point, whether the Manor of Great Bowden, in Leicestershire, was ancient demesne, it was successfully identified, by means of old deeds, with a manor called in Domesday Bugefine, and which was in a different hundred. See Sir H. Ellis's preface, as to changes in the counties and in the hundreds of Domesday.

(3) In *Alcock v. Cook*, tried before Tindal, C. J., in London, the question depended on the point, whether Sutton, in Lincolnshire, was part of the manor of Greetham, Domesday-book was produced, and

the effect of the evidence turned on what, according to the correct mode of reading Domesday, was parcel of the manor of Greetham, and whether the effect of a red line, made through the word Hythe Wapentake, denoted an error, or was for the purpose of drawing attention.

(4) See Grimaldi on the Genealogical Uses of Domesday, *Origines*, p. 6.

(5) As to the exemption of ancient mills from tithes, see stat. 9 Edw. 2, c. 5. 2 Inst. 621. Sir H. Ellis's preface as to the Mills of Domesday. As to the Churches of Domesday, see Selden on Tithes, ch. 6, p. 72. Second report on Public Records App. sec. 7, p. 456.

(6) Extracts were read from Domesday in *Rowe v. Brenton*, 8 B. & C. 738, and on various other recent occasions.

afterwards fell within the jurisdiction of the Court of Wards and Liveries, which was erected in the 32d & 33d years of Henry 8. This Court was abolished, together with the military tenures to which it owed its origin, soon after the Restoration; at which time the practice of taking inquisitions *post mortem* ceased. It seems that they were taken only upon the deaths of tenants *in capite*. (1)

In treating of the exception to hearsay evidence, which has been established in matters of pedigree, particular mention has not been made of inquisitions *post mortem*, because their admissibility and effect does not depend on their relation to questions of pedigree. But such is the use of them in proving ancient pedigrees, it has been observed, that it is easier to establish a pedigree for five hundred years before the time of Charles 2, than for one hundred years since his reign. (2)

Where there appears to have been any irregularity in the proceedings, the evidence of inquisitions *post mortem* will be rejected. Thus, in the case of the *Barony of Powis*, A.D. 1731, three inquisitions *post mortem* were produced, but as the find-

Irregular inquisitions.

(1) 2 Bl. Com. 68. St. 29 Ed. 1, de escheatoribus. The statute 1 Henry 8, passed in consequence of the accusations against Empson and Dudley. See their eloquent defence in Lord Herbert's History. The statutes 14 Edw. 3, st. 1, c. 13, and 18 Henry 6, ch. 7, relate to Escheators: Stat. 32 Henry 8, c. 46, and 33 Hen. 8, c. 22, to wards and liveries: Stat. 12 Car. 2, c. 24, to the abolition of feudal tenures. See Catalog. Harl. MSS. vol. 2, p. 457, as to five different sorts of inquisitions, *post mortem*. Of the nature and object of these inquisitions the best account is given by Thomas Astle, Esq., Keeper of the Records in the Tower, printed in the Appendix to the first report of the record commissioners. Cruise on Dignities, c. 6. s. 59. Inquisitions upon attainders of treason, or on purchase of lands by aliens are sometimes confounded with these inquisitions *post mortem*. The inquisitions

between the reign of Henry 3, and that of Car. 1, are preserved in the Tower and the Roll's Chapel; those in the chapel begin with the 1st of H. 8, and are continued down to the 20th Car. 1. There is a series of transcripts kept in the King's Remembrancer's Office, from Edw. 1, to Car. 1, and another series in the Chapter House at Westminster, from the erection of the Court of Wards, 32 Henry 8, to the abolition of that Court at the Restoration. Transcripts of Inquisitions are admissible when the originals are defaced or destroyed, *Dixon v. Atkins*, App. First Report of Record Commission, tit. "Transcripts of Inquisitions." As inquisitions *post mortem* relate to tenures in capite, the *nomina villarum*, tem. Edw. 2, supplies the best evidence as to socage tenures.

(2) Per Lord Mansfield, in *Birt v. Barlow*, Doug. 171; and see per Lord Erskine, 13 Ves. 143.

ing of the jury in two of them had exceeded the authority conferred by the writ, and a *supersedeas* had issued and vacated a third, and it appeared that the Court of Wards had declared them insufficient, they were rejected. (1)

Several inquisitions.

There are several instances of a number of inquisitions having been taken at intervals after the death of the same tenant, in consequence of the issuing of writs *de melius inquirendo*, so that sometimes, especially in cases of disputed legitimacy, they are found alternately establishing or controverting the same fact. In the case of the *Banbury Peerage*, an inquisition had been taken after the death of the Earl of Banbury, A.D. 1632, and it was thereby found, that he died without heirs male of his body; but by another inquisition taken seven years afterwards, it was found that Edward, then Earl of Banbury, was his son and next heir, and that he left another son named Nicholas. The House of Lords admitted both these inquisitions in evidence, but do not appear to have attached much weight to either of them. (2)

Effect of.

Inquisitions *post mortem* are not conclusive of the facts which they state. Thus, in the case of the *Earl of Thanet v. Forster*, (3) an inquisition, or as it was there called, an office, taken after the death of George Earl of Cumberland in the time of King James I, which recited a grant of lands from King Henry 6, to the ancestor of the plaintiff, and the subsequent seisin of his descendant, was held not to be conclusive of such seisin, but was considered to be repelled by the operation of an act of resumption of the 33 Hen. 2, vesting the reversion in the crown. Lord Hardwicke notices that such inquisitions are not conclusive evidence. (4) And in *Bree v. Beck*, (5) Bayley, B., speaking with reference to the inquisitions *post mortem* which were produced in evidence in that case, observes, that they put the value of the property so low, he was not sur-

(1) Cruise on Dignities, ch. 6, s. 60.

(2) See App. to Le Merchants' Gardiner Peerage, and note to report of Gardiner Peerage case, p. 409, were cases of conflicting inquisitions are collected. In the Lisle

case, two inquisitions expressly contradicted each other. Lisle case, p. 123.

(3) Jones, 224.

(4) *Sergeson v. Scaley*, 2 Atk. 412.

(5) 1 Cr. & J. 367.

prised that a jury should consider them as not furnishing safe and solid grounds on which they could act.

The visitation books in the Herald's Office contain likewise the result of inquiries upon public matters under public authority. They contain the pedigrees and arms of the nobility and gentry of the kingdom from the 21 Hen. 8, to the 2 James 1. The inquiries were made by the heralds by virtue of a commission under the great seal. (1) Entries of the visitations were made in books kept at the Herald's College, which have frequently been received in evidence. (2)

Herald's visitation.

An inquisition of lunacy is evidence on the trial of an indictment, to shew that the prisoner was insane, when he committed the offence. (3) Such inquisitions are evidence even against third persons who were strangers to the proceeding. Thus, in a case, where an inquisition of lunacy was offered as

Inquisition of lunacy.

(1) See an account of these books in the App. to the First Report of the Commissioners of Public Records, ch. 8, p. 82. In the Catal. Harl. MSS. vol. 1, p. 18, No. 69, mention is made of a precept to the bailiff of the wapentake to summon "all esquires and gentlemen to appear at the herald's visitation;" and of "the citation of a gentleman to appear before the Earl Marshal, and to answer for default of appearance at the herald's visitation."

(2) See *Matthews v. Port*, Comb. 63. *Petton v. Walter*, 1 Str. 162. Vin. Ab. Ev. A. b. 39. In the *Huntingdon Peerage* case, two visitation books were given in evidence; *Bell's Huntingdon Peerage*, p. 350. Chief Justice Pratt admitted the minute book of a visitation, signed by the Heads of several families, *Petton v. Walter*, 1 Str. 162. At the Herald's college are also to be found books of entries of pedigrees, concerning the admissibility of which some doubt exists. In an action of ejectment before Fortescue Aland, J., cited 12 Vin. Ab. 119, they were rejected; but they have been admitted

in some older cases, *Earl of Thanet v. Foster, Jones*, 224. 2 Plowd. 425. Pedigrees of persons claiming dignities, formerly made out by the heralds, have been admitted, on their authority, by the House of Lords, as in the claim to the barony of Clifford, A.D. 1691, *Journ.* vol. xiv., p. 613; vol. xv., p. 203. And see a standing order of the House of Lords upon the subject, *Journ.* vol. xxxi., p. 583. The books of entries of funeral certificates are described in App. to First Report of Record Commission, ch. 8, p. 82. This species of evidence was tendered in the *Banbury Peerage* case, see *Le Merchant's Gardiner Peerage*, p. 415, and in the *Huntingdon Peerage* case, in order to prove who was the chief mourner at a particular funeral. In the same case evidence was given of a funeral achievement. And see *Minutes of the De Lisle case*, p. 12, as to the Earl Marshal's book; and further, as to Herald's book, *supra*, p. 235, 236.

(3) *Rex v. Bowler*, O. B. June, 1812, before Le Blanc, J., and Lord Chief Justice Gibbs.

evidence to affect the rights of third persons, and objected to as *res inter alios acta*, Lord Hardwicke overruled the objection, and said, that inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, &c., are always admitted to be read, but are not conclusive. (1) And, in an action upon a bond against the executors of the obligor, an inquisition of lunacy has been admitted, under the plea of *non est factum*, for the purpose of shewing, that the obligor had been a lunatic from a certain time, as found by the inquisition. (2)

By warrant of
Court of Ex-
chequer.

An inquisition taken by virtue of a commission which issued in the reign of Queen Elizabeth, under the seal of the Court of Exchequer, to commissioners to inquire, whether a prior was seised of certain lands as parcel of a manor, or whether the crown was seised of them after the dissolution of the priory, was adjudged to be good evidence of those facts. (3)

By order of
House of Com-
mons.

And an inquisition, taken under an order of the House of Commons, is evidence respecting the fees of certain offices. (4)

Inquisition by
sheriff, as to
property.

Inquisitions, which are extrajudicial, are not admissible in evidence. Thus an inquisition made by a sheriff's jury, for the purpose of ascertaining, who was entitled to the property of goods taken under an execution, seems not to be admissible evidence against the sheriff, in an action of trover brought by the party, in whose favor the inquisition was found. (5) This evidence was received at the trial of a cause by Mr. Justice Buller, who admitted it, but held it not to be conclusive; and a verdict having been found for the defendants, a motion was afterwards made for a new trial, on the ground, that the inquisition was conclusive evidence in favor of the plaintiff, as against the person who contested the property with the plaintiff, and who was present at the time of taking the inquisition. But the Court refused the application. Chief Justice Eyre said, he doubted whether a sheriff can, strictly speaking, hold

Not conclu-
sive.

(1) *Sergeason v. Sealey*, 2 Atk. 412.

(2) *Faulder v. Silk* and another, executors of *Jervoice*, 3 Campb. 126, before Lord Ellenborough, C. J.

(3) *Tooker v. Duke of Beaufort*,

1 Burr. 146. *Sayer*, 297, S. C.

(4) *Green v. Hewit, Peake*, N. P. C. 184.

(5) *Latkow v. Eamer and Barnett*, Sheriff of Middlesex, 2 H. Black. 437. *Glossop v. Poole*, 3 Maule & Selw. 175.

any inquisition as to property, except under a writ *de proprietate probanda* in replevin. And Mr. Justice Buller said, he thought he ought not to have admitted the evidence at the trial, as the inquisition was not under the king's writ, but merely a proceeding by the sheriff on his own authority. Such an inquisition is not evidence for the sheriff, unless, perhaps, if the question were, whether the sheriff has acted maliciously. (1) Not evidence.

An inquisition of *felo de se*, taken before the coroner *super visum corporis*, is considered by Lord Coke to be conclusive evidence of the fact against the executors or administrators of the deceased. (2) But Lord Hale, in his Pleas of the Crown, (3) is of a different opinion, justly conceiving it unreasonable that they should be concluded, and lose the goods of the deceased without an answer, by an inquisition which may be taken by the coroner behind their backs. And it is now settled that such an inquisition may be removed into the King's Bench, and traversed by the executors and administrators of the deceased. (4) Inquisition by coroner.

A variety of other inquisitions, some upon oath and others not on oath, might be added to those already enumerated. In order to exhaust the subject, it would be necessary to pursue inquiries, concerning the records of the country, which would extend to a most inconvenient length. (5) It appears

(1) Glossop v. Poole, 3 M. & S. 175. Per Lord Ellenborough, *ib.* 177.

(2) 3 Inst. 55.

(3) 1 Pl. Cr. 416. 1 East's P. C. 389.

(4) See 1 Saund. 362, note 1, by the Editor, who has there collected the cases on this subject. As to the duty of the coroner in taking an inquest, see stat. 1 H. 8, c. 8.

(5) As, for example, Inquisitions *ad quod damnum*. Inquisitions, which are the subject of the Hundred Rolls. The *placita de quo warranto* recently used on a trial respecting the right to repair Kelham bridge. The *testa de Ne-*

vill recently used on a trial respecting the parochiality of the lands belonging to Newstead Abbey. An extent taken pursuant to a stat. of 4 Edw. I., *Rowe v. Brenton*, 8 B. & C. 747, though the commission could not be found. Survey of a Nunnery, from the First-Fruits Office, *Kellington v. Trin. Col.* 1 Wils. 170. *Underhill v. Durham*, 2 Gwill. 542. Survey of the Honor of Bolingbroke taken temp. Jac. 1, and the map annexed thereto, in which the towns spotted with gold were parcel of the Honor. Admitted by Tindal, Ch. J., in *Alcock v. Cook*, tried in London.

sufficient to refer, in conclusion, to the different ecclesiastical inquisitions or surveys.

Surveys of
ecclesiastical
benefices.

Pope Nicolas.
A. D. 1291.

The *Valor Beneficiorum*, or Pope Nicholas's Taxation, is another document of a public nature. In the year 1288, Pope Nicholas the Fourth, to whose predecessors in the see of Rome the first-fruits and tenths of all ecclesiastical benefices had for a long time been paid, granted the tenths to King Edward the First for six years, towards defraying the expense of an expedition to the Holy Land; and, that they might be collected to their full value, a taxation by the king's precept was begun in that year, and finished for the province of Canterbury in the year 1291, or the 20th year of the reign of Edward the First; and for that of York in the following year; the whole being under the direction of the Bishops of Winton and Lincoln. (1) This taxation of Pope Nicholas is an important document, because all the taxes, as well those paid to our kings as those to the Pope, were regulated by it, till the survey made in the twenty-sixth year of Henry the Eighth; and because the statutes of colleges, which were founded before the Reformation, are also interpreted by this criterion, according to which their benefices under a certain value are exempted from the restriction in the statute of the twenty-first of Henry the Eighth concerning pluralities. (2) The taxation is evidence of the rate and value, at which the persons, employed in that taxation, thought fit at that time to estimate the living. (3) The original is kept in the office of the king's remembrancer in the Exchequer.

26 H. 8.
Valor benefi-
ciorum.
A. D. 1515.

A new *Valor Beneficiorum* was instituted in the twenty-sixth year of Henry the Eighth, when the first-fruits and tenths of every ecclesiastical promotion were annexed to the revenue of the crown. (4) To ascertain their value, ecclesiastical surveys were taken, by virtue of commissions in the king's name

(1) See first Report of House of Commons on Public Records, p. 15.

(2) Humphrey v. Knight, Cro. Car. 455. 2 Lutw. 1305. Stump

v. Ayliffe, 2 Gwill. 536.

(3) By Lord Redesdale, Bullen

v. Michel, 2 Price, 477.

(4) St. 26 H. 8, c. 3.

issuing under the great seal. (1) It is to be observed, that the *Valor Beneficiorum* of the reign of Henry the Eighth in no instance mentions the existence of a modus. The commissioners appear not to have taken notice of any existing modus, or immemorial agreement between the parson and the occupiers; but to have calculated the value of the first-fruits and tenths, without considering the question of modus, or any other legal exemption.

Surveys of the church and crown lands were taken by commissioners in the time of the Commonwealth, under the authority of acts or ordinances of the parliament; and copies of these surveys were deposited in many of the cathedrals. The originals would have been good evidence of the particulars of the surveyed estates, upon the same principle as the other public surveys which have been before mentioned; but as they were destroyed at the time of the great fire in London, the copies have been admitted, as evidence, in the place of the original surveys, provided they have been kept in unsuspected repositories. (2) Parliamentary.

The history of the *Inquisitiones Nonarum* is thus given in the Report of the Commissioners of Public Records, before referred to. (3) A grant having been made by parliament to Edward the Third, in the fourteenth year of his reign, of the ninth lamb, ninth fleece, and ninth sheaf, assessors and vendors were thereupon appointed, and directed, by three commissions under the great seal, for every county in England, to assess and sell these ninths. The *Inquisitiones Nonarum* were taken under the third commission, whereby the commissioners were directed to levy the ninth of corn, wool, and lambs, in every parish, according to the value upon which churches were taxed, (this means Pope Nicholas's taxation,) if *Inquisitiones nonarum.*
A. D. 1341.

(1) Sect. 3 & 10.

(2) *Underhill v. Durham*, 2 Gwill. 542. *Green v. Proude*, 1 Mod. 117. *Bullen v. Michal*, 4 Dow. 325. 2 Price, 399, S. C.

(3) Appendix (L. 2), p. 146. The Commissioners do not appear to have been required to examine into the value of the glebe.

the value of the ninth amounted to as much as the tax; but should the value of the ninth be less than the tax, they were directed to lay only the true value of the ninth, and to disregard the tax; and in order to gain correct information of these facts, they were directed to take inquisitions, upon the oath of the parishioners, in every parish. These inquisitions form the records called the *Inquisitiones Nonarum*.

Effect of
ecclesiastical
inquisitions.

The Ecclesiastical inquisitions are used, generally, as affording an inference, and not for the simple purpose of proving a fact; as, for example, whether, consistently with the value of a benefice, as stated in such surveys, it is probable that a modus of a particular amount should have existed in the parish from time immemorial. Consequently it can rarely happen, that these surveys are conclusive for the purpose for which they are produced. (1) Great difference of opinion as to their effect for such purposes, and as to their actual and comparative credit has been expressed by Judges on various occasions. (2)

(1) See *Bree v. Beck*, 1 Cr. & J. 265. *Jee v. Hockley*, 4 Pr. 37. *Robinson v. Williamson*, 9 Pr. 136. *Armstrong v. Hewit*, 4 Pr. 221. *O'Connor v. Cook*, 6 Ves. 665. 8 Ves. 535. *Fermor v. Loraine*, cited 1 Cr. & J. 268, and the cases collected in *Short v. Lee*, 2 Jac. & W. 464. *Ashby v. Power*, 3 E. & Y. tithe cases, 1311. In *Drake v. Smith*, 5 Price, 377, Chief Baron Richards says, that he had sufficient experience in these subjects to say, that these documents could not be implicitly relied on. In *Jee v. Hockley*, 4 Price, 88, where there was merely evidence of the payment of the modus on the one side, and the amount of the modus was inconsistent with all the ancient documents, the Chief Baron said, that these documents were never conclusive, and did not make the case so clear as to prevent him from directing an issue. In *Armstrong v. Hewit*, 4 Price, 221, it was said by the Court, that the Ecclesiastical survey, or any other ancient document, was not equivalent, in point of evidence, to usage.

To the same effect, see *Tamberlain v. Humphreys*, Gwill. 1345.

(2) See *Bree v. Beck*, 1 Cr. & J. 267. In a case of *Weston v. Vaughton*, tried at Warwick, Lord Tenterden said, that it had been generally supposed, that Pope Nicholas's valuation was too low, but as the value of the living for the purpose of the inquiry was to be taken 100 years previous to the survey, it might be adopted as a safe guide. In *Chapman v. Smith*, 2 Ves. sen. 506, the Chancellor treated the survey of Henry 8, as too low. See also 6 Price, 483; 2 E. & Y. tithe cases, 141; 3 E. & Y. 951. See further, as to the Ecclesiastical survey, and its effect in proving endowments and parcels of an abbey, and the circumstance of a religious house being a greater or smaller monastery, 2 Price, 329; 4 Pr. 216; 3 E. & Y. 743, 837, 1367, 1022; 2 Jac. & W. 464; 9 Pr. 136. Lord Ellenborough, in *Roe v. Ireland*, 11 East, 283, speaks of the extreme accuracy of the parliamentary survey, and in *Blundell v. Howard*, 1 M.

CHAPTER II.

ON PUBLIC WRITINGS NOT JUDICIAL.

THE ordinary purpose for which public writings, not judicial, are produced in evidence, is to prove facts by means of an official statement. The cases upon the subject constitute important exceptions to the rule discussed in the first part of this Work, which excludes hearsay and secondary evidence. Writings of the nature in question will be found defective, in regard to those securities which are required for the admission of evidence in ordinary cases. But they are recommended by other securities which are not found in ordinary cases, arising from the public station of the authors of such writings, and from the course of public duty, under which they have been collected or delivered.

Principle of admission.

In some instances, this kind of evidence is supposed to derive superior weight from the circumstance of its being a record. The evidence, however, is not on that account incontrovertible. A record is conclusive as to all matters passing under the inspection of the proper officers, whose duty it is to draw up the record, but it is not conclusive, except upon the principle of *res judicata*, as to other matters recited or alleged in the record to be true.

Statements in records.

The most authoritative species of evidence of the nature under consideration, is that of Acts of Parliament; though it may be

Statute.

& S. 294, Lord Ellenborough says, that this document being silent as to a modus, affords strong evidence against its existence. But in *Driffield v. Oriel*, 6 Price, 934, the Chief Baron says, "as to the fact of the parliamentary survey not referring to the moduses, there is nothing in that, when opposed to the proof of actual payment." He continued, "had that document even stated that there was no mo-

dis, though it is entitled to great respect on some questions, yet, as being, on that subject, *res inter alios acta*, it would not be strong enough to overpower the positive evidence of actual payment. See further, as to this survey, *Doe v. Harcourt*, Peake's Ev. App. 28; 1 E. & Y. 581; *Atkins v. Drake*, 1 M'Cl. & Y. 221, 223, 231. *Travis v. Oxter*, 3 E. & Y. 1252.

doubted, whether the facts recited in them are always inquired into with the same care that has been used in several other species of public investigations. It has been held, that the preamble of an Act of Parliament, reciting that certain outrages had been committed in parts of the kingdom, was admissible evidence for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (1) Public Acts of Parliament, it was said, are binding upon every subject, the Judges are bound to take judicial notice of their contents; every subject is, in judgment of law, privy to the making of them, and supposed to know them; the passing of an Act of Parliament is a public proceeding in all its stages, and when the act is passed, it is, in the contemplation of law, the act of the whole body of the kingdom. The Court of King's Bench, for these reasons, were of opinion, that the preamble in question had been properly admitted in evidence.

Parliamentary
resolution.

A resolution of either House of Parliament has been considered not to be evidence of the truth of the facts there affirmed. In the case of Titus Oates, who was charged with having committed perjury on the trial of persons suspected of the Popish Plot, a resolution in the journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. (2) But an address of the Lords to the king, and the king's answer, have been admitted as evidence of

(1) *Rex v. Sutton*, 4 M. & S. 532. Lord Coke, *Litt.*, lib. 1, ch. 2, s. 13, says, it cannot be thought that a statute will recite a thing against the truth. See *Rex v. De Berenger*, 3 M. & S. 67, recital of the existence of a war. *Brazenose Coll. v. Bp. of Salisbury*, 4 Taunt. 831, annexation of prebend. *Brisco v. Lord Egremont*, 3 M. & S. 88, a person called an Earl, Bp. of Meath *v. Marq. of Winchester*, 3 Bing. N. C. 209, recital of 4 Hen. 7, c. 14: see as to remarkable recitals, stat. 31 Henry 8; voluntary surrender of abbots, 41 Geo. 3; possession of Malta, 7 Anne, c. 12; affront to the Russian Ambassador,

9 Anne, 16; the stabbing of Harley, by Guiscard. Recitals in private acts have not the same effect, see per Alderson, B. 1 Cr. M. & R. 47, in explanation of the decision in *Brett v. Beales*.

(2) 4 St. Tr. 39; 10 Howell, 1165, 1167. Perhaps the circumstances attending the trial may be thought to derogate from this authority; however, a resolution of either House stands upon a different ground from a legislative act, or a proclamation by the crown. See *Knollys's case*, 2 Salk. 509, as to a replication of a peerage being disallowed by the Lords.

an averment in an information, that certain differences had existed between the King of England and King of Spain. (1)

The proceedings of the Lords and Commons, which are not Acts of Parliament, are properly evidenced by their journals. These are the documents peculiarly appropriated to the purpose of preserving the memory of such proceedings, which do not appear capable of other authentic or satisfactory proof. The journals of the House of Lords, indeed, are sometimes in the nature of a record of judicial proceedings. Thus, an entry in the journals of the House of Lords, stating that a judgment below had been reversed, is the proper record of the fact of reversal. (2) But the journals of the House of Lords, without reference to their judicial character, as well as those of the House of Commons, are evidence of public transactions which have taken place in either house, and of which it is the duty of the officers of the house to preserve a faithful memorial. Thus the journals have been admitted to prove an address from the House of Lords to the king, and the answer of the king. (3)

Journals of
Parliament.

Statements of facts in acts of state, emanating from the crown, have credit attached to them in Courts of Justice. Thus, in the case of the *King v. Sutton*, (4) before cited, the Court of King's Bench determined, that the king's proclamation (which recited that it had been represented, that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrages of that particular description had been committed in those parts of the country.

Proclamation.

The public acts of government, and acts by the king in his political capacity, are commonly announced in the gazette published by the authority of the crown. Of such acts announced to the public in the *Gazette*, the *Gazette* is admitted,

Gazettes.

(1) See *Franklin's case*, 17 Howell, 637; 9 St. Tr. 259, cited by Buller, J., in *Rex v. Holt*, 5 T. R. 445.

(2) *Jones v. Randall*, Cowp. 17.

(3) *Rex v. Franklin*, 17 Howell, 637.

(4) 4 M. & S. 532.

in Courts of Justice, to be good evidence. It has been held, that proclamations for reprisals, for a public peace, or for the performance of quarantine, may be proved by the *Gazette*. (1) A *Gazette* in which it was stated, that certain addresses had been presented to the king, has been judged to be proper evidence to prove an averment of that fact in an information for a libel; (2) "for they are addresses," said Lord Kenyon, "of different bodies of the king's subjects, received by the king in his public capacity, and they thus become acts of state."

In some instances in which *Gazettes* are evidence of public transactions, it may be thought that the announcement in the *Gazette* was the fact itself to be proved; and generally the proof by primary evidence of the facts announced in the *Gazette* would be attended with much inconvenience, whilst the danger arising from accidental errors in the *Gazette* is not very considerable, and it is to be remembered, that intentionally to publish, especially in the royal *Gazette*, any thing as emanating from royal authority, with knowledge that it did not so emanate, would be a misdemeanor.

But *Gazettes* are not evidence of private titles or private interests, which have no reference to the affairs of government, as a presentation, or the grant by the king to an individual, (3) nor is a *Gazette* evidence to prove an appointment to a commission in the army. (4)

Notices relating to bankruptcies are frequently inserted in

(1) *Rex v. Holt*, 5 T. R. 443. *Atty. Gen. v. Theakestone*, 8 Price, 89. *Quelch's case*, 8 St. Tr. 212. *Dupays v. Shepherd*, Rep. temp. Holt, 296. *Gen. Picton's case*, 30 Howell, 493, in which case the articles of capitulation for the surrender of an island were proved by the *Gazette*. To ascertain the date of a declaration of war, the declaration from the Ambassador of the Court abroad transmitted by him to the Secretary of State's office, is evidence. Public noto-

riety has been held sufficient evidence of a war, *Foster's Disc. ch. 2, sect. 12.* 11 Ves. 292. *Thelluson v. Cosling*, 4 Esp. 266. *Case of Eliza Ann*, 1 Dods. Ad. Rep. 244. Similar questions have occurred as to foreign loans, whether they have been made to friendly or recognised governments.

(2) *Rex v. Holt*, 5 T. R. 443.

(3) See *Rex v. Holt*, 5 T. R. 443.

(4) *Kerwan v. Cockburn*, 5 Esp. 233. *Rex v. Gardner*, 2 Camp. 513.

the *Gazette*, but it seems, that, unless the party, who is to be affected by the notice, be proved to be in the habit of reading the *Gazette*, such evidence will be of little avail, though it is admissible. (1)

Upon the same principle on which *Gazettes* are receivable in evidence, copies of written acts of state, purporting to be printed by the king's printer, are evidence of those acts. Thus articles of war, purporting to be printed by the king's printer, are allowed to be evidence of such articles. (2)

All public acts done by the crown, affecting the revenues and possessions of the crown, are considered as public evidence. The same rule applies to the acts of the king, when there is no Duke of Cornwall, or of the Duke of Cornwall, when there is one, affecting the revenues or possessions of the duchy; as, for example, an ancient caption of seisin to the use of the Duke of Cornwall, or the enrolment of the counterpart of a lease granted by the Duke. (3) In like manner, an enrolment of a lease of lands belonging to the crown, in right of the Duchy of Lancaster, is admissible, on account of the interest of the crown in the duchy. (4)

The King's sign manual, authorizing the release of a prison-

King's sign manual.

(1) See *Graham v. Hope*, Peake, 154. *Godfrey v. Macanley*, *ib.* 155. 1 Esp. 371, S. C. *Newsome v. Coles*, 2 Camp. 617. *Gorham v. Thompson*, Peake, 42. *Leeson v. Holt*, 1 Stark. 186. *Mann v. Baker*, 2 Stark. 255. The use of the *Gazette*, on such occasions, is not for the purpose of proving facts by the authority of the *Gazette*, which is more particularly the subject of the present section, but for the purpose of proving notice. As to the point of notice, it has been held, that knowledge of the blockade of a port is not to be necessarily presumed from the notification of such blockade in the *Gazette*, but is a question of fact for the jury, *Har-ratt v. Wise*, 9 B. & C. 712. See

ib. various points as to notice of blockade.

(2) *Rex v. Withers*, cited 5 T. R. 446. As to the Court taking judicial notice of articles of war, see *Bradley v. Arthur*, 4 B. & C. 304. As to the certificate of the Secretary at War, see *Lloyd v. Woodall*, 1 W. Bl. 29.

(3) *Rowe v. Brenton*, 8 B. & C. 765.

(4) *Kinnersly v. Pope*, Doug. 56. In the case of *Alcock v. Cook*, tried before Tindal, Ch. J., in London, a variety of documents, chiefly relating to the Honor of Bolin-broke, were proved by examined copies, taken from the originals, in the office of the Duchy of Lancaster.

er, is evidence to prove the legality of his being at large. (1) A
 Pope's license. license from the Pope, granted in the reign of Edward 2, has
 been adjudged to be evidence of an impropriation, the Pope
 being formerly the supreme head of the church, and having the
 disposition of all spiritual benefices. (2) For the same reason,
 Bull. a Pope's Bull was formerly admitted in evidence, to shew that
 monastery lands had a special exemption from the payment of
 tithes. (3)

Official regis- The next species of public writings, to be considered, are
 ters. those in which official persons are required to make a memoran-
 dum of particular transactions occurring in their presence.
 The obligation to make such a memorandum is sometimes
 imposed by statute, and sometimes is incident to the course of
 public business.

Parish regis- Parish Registers began to be kept in the thirtieth year of
 ters. Henry 8. The practice is said to have been adopted at the
 instigation of Lord Cromwell, who was at that time Vicar
 General, and in whose Court all wills of property, exceeding
 the amount of 200*l.*, were required to be proved. It served
 his purpose, therefore, to set on foot a registry. The keeping
 of parish registers was enforced by injunctions of Edward 6,
 and Queen Elizabeth, and also by one of the ecclesiastical
 canons, A. D., 1603. The practice first received the sanction
 of an act of parliament, by the statute 6 & 7 W. 3, c. 6.
 Particular provisions were afterwards made respecting parish
 registers, by the marriage act and other statutes. (4)

Parochial registers are considered evidence, that the transac-
 tions, required to be recorded in them, occurred on the days
 specified in the register. Thus a register has been received as
 evidence between strangers, of the time of marriage. (5)

(1) Miller's case, Leach, 69.

(2) Cope v. Bedford, Palm. 427.

(3) Lord Clanricard's case, Palm.
 37. See Brett v. Ward, Winch.
 70, as to copy of a Bull.

(4) See the Attorney General's
 Report, Bell's Huntingdon Peer-

age, 332. Burn's Ecc. Law, 390.
 The Marriage Act, 26 Geo. 2, c.
 33; stat. 52 Geo. 3, c. 146; and
 the recent statute, 6 & 7 Will. 4,
 c. 86.

(5) Doe d. Wollaston v. Barnes,
 1 Mo. & R. 386. An entry by a

Such registers are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, an entry in a register of christenings, stating the year of the birth, is not evidence in support of a plea of infancy. (1)

The register, used for its proper purpose, may constitute part of a chain of evidence, to prove another fact, as birth within a particular parish, where, for example, it is shewn, by evidence *dehors*, that the child was extremely young when baptized; but the register, of itself, does not prove the fact of birth in the parish. (2) It is obvious that evidence *dehors* the register must in every case be necessary, in order to identify the parties. (3)

Various questions have arisen as to what can be properly read as a register, so as to afford evidence of the truth of facts therein stated. It seems the better opinion, that the books of Fleet marriages cannot be read as registers, not having been compiled under public authority. (4) A copy of a register of baptism, kept in the island of Guernsey, is not admissible in

Legal registers.

minister of a baptism, which took place before he became minister, and of which he received information from the parish clerk, is not admissible, nor is the private memorandum made by the clerk, who was present at the baptism, *Doe v. Bray*, 8 B. & C. 813.

(1) *When v. Law*, 3 Stark. 63. *Burghart v. Angerstein*, 6 C. & P. 690. *Rex v. Clapham*, 4 C. & P. 29. *Rex v. North Petherton*, 5 B. & C. 508. *Burghart v. Angerstein*, 6 C. & P. 690. *Duins v. Donovan*, 3 Hagg. 301. It seems, however, that a statement in a register, that a child was base-born, has been received, *Cope v. Cope*, 1 Mo. & Ro. 269. It was said, that the same evidence had been received, in *Morris v. Davis*.

(2) *Rex v. North Petherton*, 5 B. & C. 508.

(3) *Best v. Barlow*, Doug. 170, as to the various ways in which the

identity or the parties to the register may be proved. *Draycott v. Draycott*, 12 Vin. Ab. 89, pl. 11. *Coventry's Conv. Ev.* p. 278; *Martin's Introduction to Conveyancing*, p. 192. *Bain v. Mason*, 1 C. & P. 202.

(4) *Read v. Passer*, 1 Esp. 213. *Lloyd v. Passingham*, 16 Ves. 59. *Peake*, 233; 1 Esp. 136, 197. Most of the Fleet books were purchased by Government in 1821, and deposited in the Consistory Court of London; they contain original entries of marriages solemnized in the Fleet prison from 1686 to 1754. See many curious particulars respecting Fleet marriages and Guernsey marriages, in *Burn's Fleet Reg.* The books have occasionally been received in evidence, *Lawrence v. Deacon*, *Peake*, 136; and see *Doe v. Lloyd*, 1 Esp. 215; *Peake*, 231.

our Courts of Law ; (1) nor is the copy of a register of a foreign chapel admitted here as proof of a marriage abroad. (2) The copy of a register of a Dissenting chapel is not admissible for such a purpose ; (3) it seems also that the originals of such registers would not be receivable in evidence.

Informal registers.

With respect to imperfect or informal registers,—where it appeared that the practice was to make entries in the general parish register once in three months, out of a day-book, in which the entries were made immediately after the christening, or on the same morning ; and in the day-book, after a particular entry, the letters B. B. (signifying base-born) were inserted, which were omitted in the register ; it was held, that evidence of the day-book could not be received, as there could not regularly be two parish registers. (4)

Effect of register.

It may be observed, that the entry in the register is not essential to the validity of a marriage, so that if it has not been expressed in the regular form, the only consequence will be, that it cannot be admitted as evidence of the marriage, which must, therefore, be established by some other medium of proof. Even upon an indictment for bigamy, where it is necessary to give evidence of actual marriage, it is sufficient to prove the fact by a person present at the time, without giving any evidence of the registration. (5) In order to prove that the parties described in the register are the same parties whose marriage is in question, it is unnecessary to call either of the subscribing witnesses to the register. (6)

(1) *Huet v. Le Mesurier*, 1 Cox. Ca. 275.

(2) *Leader v. Barry*, 1 Esp. 353.

(3) *Newham v. Raithby*, 1 Philimore, 315. *Es parte* Taylor, 1 J. & W. 483. *Whettuck v. Waters*, 4 C. & P. 375. An arrangement was made by Lord Stowell and the Bishop of London, that persons residing abroad might transmit to this country certificates of baptisms, marriages and burials, for the purpose of being deposited in the registry of the diocese of London, see *Paroch. Reg. Rep.* p. 46, Mr.

Shephard's Evidence. On the registers of Dissenters, see *Paroch. Reg. Rep.* p. 79, 112. As to Quakers' registers, and their birth notes and burial notes, see *Paroch. Reg. Rep.* p. 72. As to Jewish registers, see *ib.* p. 23, 24.

(4) *May v. May*, 2 Str. 1073, and see *Lee v. Meacock*, 5 Esp. 177. *Walker v. Wingfield*, 18 Ves. 443.

(5) *Rex v. Allison*, R. & R. Cr. Ca. 103.

(6) *B. N. P.* 27. *Birt v. Barlow*, Doug. 172.

The acknowledged insufficiency of parochial registers for the purpose of proving pedigrees and other national objects of importance, combined with the fact that they had been often falsified, stolen, burnt, inaccurately transcribed, or carelessly preserved, rendered it highly expedient that a national registration of births, marriages, and deaths, should be established; and accordingly, the statute of 6th & 7th W. 4, c. 86, was passed for this purpose. (1)

With respect to the registers of ships, their effect is of a different nature from that of parish registers. To give them the effect of proving the facts stated in them, would enable parties to make evidence for themselves; the entry not being of any transaction, of which the public officer, who makes the entry, is conusant. The entry, therefore, or the absence of it, is a fact to be proved, and does not furnish evidence of any other fact. Thus the register or certificate is not *prima facie* evidence of title in favor of the owner; nor against him, unless proved to have been made with his consent, or to have been recognised by him. But the register and certificate of register, are conclusive evidence of want of title against those who are not named in the register. (2)

Another species of public documentary evidence consists of books, kept under the authority of particular statutes, or in public offices, in the course of official duty. It has been held, that the register of the navy-office, with proof of the usage to return all deaths happening at sea, is evidence of the death of a sailor. (3) The bank-books are admissible, to prove the

(1) See Paroch. Reg. Rep. p. 9. Numerous anecdotes are to be found in various works respecting the mode in which parish registers have been preserved, and which are of a very ludicrous description.

(2) Price v. Anderson, 4 Taunt. 652; and see Tinkler v. Walpole, 14 East, 226. Flower v. Young, 3 Camp. 240. Teed v. Martin, 4 Camp. 90. Robertson v. French, 4 East, 136. Hubbard v. Johnstone, 3 Taunt. 77. Thomas v. Foyle, 5 Esp. 83. Camden v. Anderson, 5 T. R. 709. Marsh v. Robinson, 4 Esp. 98. On the subject of ship registers, the reader is

referred to Lord Tenterden's Treatise on Shipping, ch. 2, p. 27. Upon the same principle, an entry in books kept in the office for licensing stage-coaches, is not proof that persons named in a license are owners of a coach, Strother v. Willan, 4 Camp. 24. See also Ellis v. Watson, 2 Stark. 453, 478. A British register, describing a vessel to be British built, is not evidence of that fact. Reusse v. Myers, 3 Camp. 475.

(3) Wallace v. Cook, 5 Esp. 117, from the Sick and Hurt Office to the muster-book of the Navy Office. Rex v. Fitzgerald, 1 Leach, 20. 2

transfer of stock. (1) The copy of an official paper, containing the number of passengers on board a vessel, made by the captain, in pursuance of an act of parliament, and deposited at the India House, has been admitted to prove the number and description of persons, as stated. (2) The book at Lloyds' is evidence of the capture of a ship. (3) The book from the Master's office is evidence to prove a person an attorney of the Court, with the production of the roll. (4) The books of the King's Bench and Fleet prisons are admissible to prove the dates of the commitment and discharge of prisoners. (5) Entries in the books of a clerk of the peace of deputations, many years since granted to gamekeepers by the lord of a manor, are evidence, without the production of the deputations themselves, to shew that the party mentioned exercised the right of appointing gamekeepers, by applying to the clerk of the peace to get certificates. (6) A copy from the custom-house of the searchers' report of a cargo kept there is evidence. (7) The poll-books at an election for members of parliament, are evidence in a penal action, for bribery. (8)

Parish books are directed to be duly kept by the statute

East, P. C. 953. *Rex v. Rhodes*, 1 Leach, 24. On plea of coverture, see *Barber v. Holmes*, 5 Esp. 190.

(1) *Breton v. Cope*, Peake, 30.

(2) *Richardson v. Mellish*, 2 Bing. 229, and see *Lacon v. Hooper*, 1 Esp. 246, as to entries required in the whale fisheries.

(3) *Abel v. Potts*, 3 Esp. 242. It is not notice of a loss to any person in particular, but coupled with other evidence, may go to the jury. Lloyd's Register is not admissible to prove a ship copper-fastened, *Freeman v. Baker*, 5 C. & P. 475, as to this book, see *Ker v. Shedden*, 4 C. & P. 531, n. a. Further as to Lloyd's List, see *Bain v. Case*, 3 C. & P. 496.

(4) See *Jones v. Stevens*, 11 Price, 235. *Rex v. Crossley*, 2 Esp. 526.

(5) *Salte v. Thomas*, 3 B. & P. 188. *Rex v. Ackles*, 1 Leach, 391. They are not admissible to prove the cause of commitment, *ib.* Some doubts exist as to the principle on which these books are

received; for it has been intimated that a copy would not be evidence.

(6) *Hunt v. Andrews*, 3 B. & A. 341. *Rushworth v. Craven*, M'C. & Y. 417, as to the effect of deputations.

(7) *Johnson v. Ward*, 6 Esp. 48, and see as to Custom-house books, *Tomkins v. Atty. Gen.* 1 Dow. 404. The Custom-house and Excise books are frequently used as affording *prima facie* evidence against parties by way of admission, *Ellis v. Watson*, 2 Stark. 453. *Rex v. Grimwood*, 1 Price, 369.

(8) *Mead v. Robinson*, Willes, 422. *Rex v. Hughes*, cited *ib.* *Rex v. Duins*, 2 Str. 1048. For other books, see *Henry v. Leigh*, 3 Camp. 499. Bankruptcy books, *D'Israeli v. Towel*, 1 Esp. 427. *Watson v. King*, 4 Camp. 272, log-book of man-of-war and official letter, to prove the parting of a vessel from convoy, and see *Rundle v. Beaumont*, 4 Bing. 537. *Burrough v. Martin*, 2 Camp. 112, log-book to refresh memory. En-

17 Geo. 2, c. 38, s. 14, enacting that true copies of all rates and assessments, made for the relief of the poor, shall be entered in a book, and attested by the churchwardens and overseers, and carefully preserved. The two following statutes provide for the keeping of certain books by the parish officers, containing some particulars respecting the descent of paupers, which may be genealogically useful. By the 2 Geo. 3, c. 22, a register was required to be kept in every parish within the bills of mortality, in which were to be registered all infants under the age of four years, which should be in the workhouse, hospital, or other place provided for the maintenance of the poor, or under the care of the churchwardens or overseers of the poor, with the times when they were received, their names, age, and whatever description related to them as far as could be traced.

Parish books.

Of pauper children.

In case any infant were received into the workhouse before it was baptized, or known to be baptized, due care should be taken to baptize the same within fourteen days after its reception, so that the Christian and the true surname, if known, and if not known, a surname to be given by the churchwardens and overseers of the poor or any one of them, might be regularly entered in the said book; and the name and surname of such infant should also be registered in the parish register of such parish. Copies of the registers were to be laid monthly before the vestry, and at the end of every year a copy was to be deposited in the vestry room; the originals remaining with the parish books, in the custody of the parish officers. And lastly, copies signed by five of the vestry, churchwardens, overseers, vestry clerk, and masters of the workhouse, are to be delivered yearly to the clerk of the company of parish clerks, who was to cause them to be bound up in alphabetical order, and make an annual abstract thereof; and the register and abstract should remain in the custody of the masters, wardens, and court of assistants of the company of parish clerks.

By the 42 Geo. 3, c. 46, overseers of the poor in every

Of parish apprentices.

tries by Commissioners of paving in book directed to be kept by act of parliament. Trustees of British Museum v. Furnis, 5 C. & P. 460.

parish are required to keep a book containing the name, sex, and age of every parish apprentice, the names and residence of their parents, and other particulars. The registers so kept are to be open to public inspection, and are declared to be sufficient evidence of the existence of such indentures, and of the several particulars respecting them specified in the registers, in case it shall be satisfactorily proved that the indentures are lost or destroyed.

Vestry book.

An entry in a vestry-book, stating that a certain individual was duly elected treasurer of a parish, at a vestry duly held in pursuance of notice, is evidence of such election. (1) In an action for disturbing the plaintiff in the enjoyment of a pew claimed in right of his messuage, an old entry in a vestry-book signed by the churchwardens, stating repairs of the pew by a former owner of the messuage under whom the plaintiff claimed, is evidence to prove the plaintiff's title, as being made by the churchwardens within the scope of their official authority. (2) In a late case, old entries in the vestry-books of a parish were held not to be evidence for the purpose of shewing the right of election to a parish office to be in the parishioners concurrently with the rector, and not in the rector alone, on the ground, that it did not appear that the incumbent was present at the meeting they related to. But extracts from the register of the bishop of the diocese, were received in evidence to prove the same appointments, as were also several entries of vestry meetings at which the rector was present. (3)

Rate books.

Books of parish rates have occasionally been used in evi-

(1) *Rex v. Martin*, 2 Camp. 100. Such entries are often the only written memorial of elections; indeed, they may be considered, in some measure, as the very thing to be proved.

(2) *Price v. Littlewood*, 3 Camp. 288. Entries made by a churchwarden in a book in which he did not charge himself, apparently not part of his official duty, were rejected. *Cooke v. Banks*, 2 C. & P. 478. An entry in a book kept in a

parish chest is not evidence for the parish of a certificate, *Rex v. Debenham*, 2 B. & A. 185. As to parish books, see further *Goss v. Watlington*, 3 B. & B. 132, and *supra*, p. 327.

(3) *Hartley v. Cook*, 5 C. & P. 441. Papers handed over to the present incumbent by the representatives of the deceased incumbent were received as parish papers in *Earl v. Lewis*, 4 Esp. 1.

dence for the purpose of proving the existence and residence of parishioners at particular periods. Thus, in the case of the *Zouch Peerage*, the book of rates and loans of the parish of Hanbury was produced, in order to prove the existence of a person, a widow, and her residence there in the year 1649, which was done by the entry of the payment of her subscription to a parish loan in that year. (1)

It seems that land-tax assessments are evidence to prove seisin, on the ground that it is the duty of a public officer to ascertain the occupier, and to charge him. Connected with other evidence, (as receipts in a steward's book,) such assessments have been considered to be entitled to weight. (2) But they were held to be no evidence of seisin, in a case where the name of a former occupier had been incorrectly inserted, and no alteration had been made subsequently, and where it was the custom to continue the name of an ancestor on the assessment books, so long as the property continued in the same family. (3)

A bishop's register is evidence of business transacted at a visitation, and where the visitation was in the year 1606, and the entry was relative to the admission of a curate of a particular church in the year 1591, according to a particular cus-

(1) Printed Evidence, 162. Such books are more clearly admissible where they contain an entry in which a person charges himself with the receipt of a rate or other money, as in the *Chandos Peerage* case, p. 97, where the churchwarden's account books contained an entry of money received at a burial by the parish clerk, to be accounted for to the churchwardens. The date of *Caxton's* burial has been fixed by a charge of twenty pence for two torches and four tapers used at his funeral, to be found in the parish books of *St. Margaret's Westminster*.

(2) *Doe d. Strode v. Seaton*, 2 Ad. & E. 182. Where the receiver charges himself with the receipt, the land-tax assessment is evidence, upon a principle before considered,

in treating of hearsay evidence. *Doe d. Smith v. Cartwright*, R. & M. 62. See *Rex v. Commissioners of Land Tax*, 2 T. R. 234.

(3) *Doe d. Stansbury v. Arkwright*, 2 Ad. & E. 182. See this case explained by *Patteson, J.*, in *Doe d. Strode v. Seaton*, 2 Ad. & E. 178. The two first entries were in the name of *T. S.*, who was dead at the time of their dates, subsequently they were in the name of *Mr. S.* The seisin of *S. S.* devisee of *T. S.* was in question. The assessments were received but were thought to be no evidence of the title. The Chief Justice observed, that it would be indifferent to the collectors from whom they got the amount of the tax, so that it was raised.

tom, the register was held to be evidence of such custom. (1) On a question, whether a particular district was part of a parish, it was held, that a book produced from the chapter-house of the Dean and Chapter of Sarum, purporting to contain copies of leases granted by the dean and chapter, and which book was open to the tenants of manors within which the lands were situate, was evidence as a public book, on a question of reputation, without any proof that possession accompanied the particular leases. (2)

Ministers' accounts.

Ministers' accounts of monasteries frequently furnish important evidence in suits for tithes and upon questions concerning endowments, as exhibiting a detailed description, made out from year to year, of the parcels and value of property which had belonged to the monasteries, and had become vested in the crown. These accounts have been relied on, even in preference to the Ecclesiastical surveys. The ministers derived their authority under the statute 27 Hen. 8, c. 27, for the creation of the court of augmentations. A commission and instructions were prepared in obedience to this statute; but no official report of the commissioners appears to be extant. The accounts for different years are frequently mere transcripts of each other, and occasionally they will be found to make returns of property belonging to the monasteries, long after it has been parted with by the crown. (3)

Terrier.

Another species of public documentary evidence is that of terriers. By the ecclesiastical canons an inquiry is directed to be made from time to time of the temporal rights of the clergy-

(1) *Arnold v. Bishop of Bath and Wells*, 5 Bing. 316, and see *Bullen v. Mitchell*, 2 Price, 399; *Bishop of Meath v. Belfied*, 1 Wils. 215.

(2) *Coombs v. Wheeler*, M. & M. 398. The same kind of evidence was received from the office of the Bishop of Durham, in *Humble v. Hunt*, Holt's N. P. C. 601. A bishop's endowment under his seal is evidence, *Potts v. Durant*, 4 Gwill. 1453. As to Bp. Wells's book, see *Tucker v. Wilkins*, 4 Sim.

262. Further, as to Bishop's books, *Leonard v. Franklin*, 4 Pr. 264. *Hulse v. Eyston*, 4 Pr. 417. *Hebden v. Freeman*, 4 Pr. 420.

(3) In a case of *Collins v. Gresley* tried at Derby, and which was an issue from the Court of Exchequer, upon the equity side of which Court various motions were made in the cause, the subject of ministers' accounts was much discussed; there is scarcely any information respecting them to be found in the books.

man in every parish and to be returned into the registry of the bishop. This return is denominated a terrier.

The principle, on which terriers appear to be receivable in evidence, has been considered not so much with reference to the official character of the statements which they contain, as to the fact that they are admissions by persons who stood in a degree of privity with the parties, between whom they are sought to be used. Accordingly, a terrier is never admitted for a parson, unless it be signed by a churchwarden, or, if the churchwardens are nominated by him, by some substantial inhabitants of the parish. (1) This is not altogether on the ground of the terrier being imperfect; for it is not necessary, in order to make a terrier admissible in evidence for the parson, that it should have been made a perfectly formal instrument by the authentication of his predecessor's signature; indeed it has been said, that the absence of such signature makes the terrier stronger evidence in favor of a successor. (2) It seems that a modus cannot be established by evidence of terriers alone, without some evidence of payments; unless, perhaps, when the terriers have been made in the time of the existing parson. (3) Terriers have not always been confined, as to their effect, to

(1) B. N. P. 248. *Earl v. Lewis*, 4 Esp. 3. A terrier not signed by the owner of a particular farm is evidence against a succeeding owner on the subject of a modus claimed for the farm; *Mytton v. Harris*, 3 Price, 19.

(2) *Illingworth v. Leigh*, 4 Gwill. 1615; *Potts v. Durant*, 3 Anstr. 796. An imperfect terrier may sometimes be used by way of admission; *Maddison v. Nuttal*, 6 Bing. 226. As to imperfect and irregular terriers, see *Atkins v. Drake*, M'Clel. & Y. 214; *Bertie v. Beaumont*, 2 Price, 310.

(3) *Lake v. Skinner*, 1 J. & W. 9; see further on the effect of terriers, *Atkins v. Drake*, M'Clel. & Y. 214; *Stuart v. Greehall*, 8 Price, 113, where the two earliest terriers negatived a modus, which the subsequent terriers confirmed. Great weight was given to the evidence

of terriers in *Drake v. Smith*, 5 Price, 369. Terriers, and indeed all other tithe evidence, of a date shortly subsequent to the Restoration, are open to much observation. It will be observed, that terriers are very frequently merely copies of each other, and signed without much consideration; and not unfrequently have been fraudulently obtained. In *Weston v. Vaughten*, tried by Lord Wynford at Warwick, his Lordship said, that there could not possibly be better evidence of the rights of the parish than terriers, and that "if every one of the persons were in the witness-box, by whom at various periods, these recognitions of the respective rights of the clergyman and parishioners had taken place, it could not be so satisfactory as the terriers themselves."

controversies affecting the landowners on the one side and the parson on the other. They are admissible in suits between a vicar and impropriator. (1)

Post marks.

Post-office marks, in town or country, proved to be such, are evidence that the letters, on which they are impressed, were in the office to which those marks apply at the dates which the marks specify. (2) An almanac has been admitted good evidence, to prove that a particular day was Sunday. (3)

Almanac.

Manor books.

The rolls of manor-courts may be considered as the title deeds of copyhold property, and, for the purpose of proving title to copyhold estates, are receivable against all persons upon the same principle as actual conveyances. The rolls sometimes also afford evidence of copyhold customs, either by way of general statement of a custom, or as containing entries of acts done in the copyhold court, from which the existence of the custom may be inferred; they also, sometimes afford evidence of the boundaries of the manor, and of the boundaries of particular estates situate within it. To prove facts of this description, the manor rolls are evidence between the lord and his copyholders, or between different copyholders. As regards strangers to the manor, it seems that entries in the rolls can only be received on the footing of admissions, or as hearsay evidence upon matters of general right. (4)

Corporation books.

Corporation books are evidence, by way of admission, between members of the corporation. They are admissible also to prove entries of a public nature. (5) They sometimes con-

(1) *Illingworth v. Leigh*, 4 Gwill. 1615; *Potts v. Durant*, 3 Anst. 796, the terrier was imperfect, as not being signed by the vicar. It would seem to have been treated as evidence of reputation.

(2) *Plumer's case*, R. & R. Cr. Ca. 264. See *Fletcher v. Braddyll*, 3 Stark. 64. *Archangelo v. Thompson*, 2 Campb. 623. *Cotton v. James*, M. & M. 276.

(3) *Page v. Faucet*, Cro. Eliz. 227.

(4) B. N. P. 247. Ancient writings,

"*assensu omnium tenentium*." *Denn v. Spray*, 1 T. R. 466. Entry of mode of descent, though there be no instance of taking accordingly. *Roe v. Parker*, 5 T. R. 26. *Doe v. Askew*, 10 East, 520. See *Chapman v. Cowlan*, 13 East, 10. *Doe v. Askew*, 10 East, 520. *Roe v. Jeffery*, 2 M. & S. 92. *Richards v. Basset*, 10 B. & C. 657. On the effect of manorial documents, *vide supra*, p. 261.

(5) Per Lord Tenterden, Ch. J., in *Marriage v. Lawrence*, 3 B. &

tain the only memorial of acts of the corporation, in which case the entry is the thing itself to be proved. They occasionally contain hearsay evidence relative to matters, concerning which evidence of reputation is admissible. They cannot, in general, be adduced by a corporation, in support of its own rights or privileges, against strangers. (1)

"A general history may be admitted," says Mr. Justice Buller, "to prove a matter relating to the kingdom at large." (2) Thus, in the case of *St. Katharine's Hospital*, Lord Hale allowed Speed's *Chronicles* to be evidence of the death of Isabel, Queen Dowager of Edward the Second. (3) So, chronicles have been admitted to prove that, at a certain period King Philip had not assumed the style given him in a particular deed. (4) And the same book was admitted as evidence of the death of Edward the Second's queen, in the case *Lord Brouncker v. Sir R. Atkins*, (5) where Chief Justice Pemberton said, he knew not what better proof they could have. Histories, however, it is admitted, cannot be received as proof of a private right or particular custom. (6) Camden's *Britannia* was therefore rejected on an issue, whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town, or only in a certain place. And in another case, where the question was, whether a particular abbey was of the inferior order, Dugdale's *Monasticon* was refused, because the original records might be had in the augmentation office. (7) So, it has been determined, that Dugdale's *Baronage* is not evidence to prove a descent. (8)

A. 144, case of Gibbon upon a *quo warranto*, 17 Howell, 810, 854, a right of swearing and admitting freemen.

(1) 1 H. Bl. 214, n. Mayor of London v. Mayor of Lynn. Rex v. Mathersell, 1 Str. 92. Marriage v. Lawrence, 3 B. & A. 142. Brett v. Beales, M. & M. 429. The books of a corporation aggregate are admissible on a question of tithes in the same manner as those of a corporation sole. Short v. Lee, 2 J. & W. 470.

(2) Bull. N. P. 248.

(3) 1 Vent. 161. *Stainer v. Burgeses* of Droitwich, 1 Salk. 282. Skin. 623, S. C.

(4) *Neale v. Fry*, cited 1 Salk. 282. B. N. P. 249.

(5) Skin. 14.

(6) Bull. N. P. 248. *Cockman v. Mather*, 1 Barnardist. 14.

(7) 1 Salk. 282. Skin. 623.

(8) *Piercey's case*, 2 Jon. 164. A year-book is evidence to prove the course of the Court, 1 Salk. 281. *Spelman's Nomina Villarum* has been received to prove Newstead a vill. *Bishop Wells' liber de*

A question arose, on the impeachment of Warren Hastings, as to the competency of proving a national custom by a general history. The managers for the Commons wished to prove the customs in Hindostan, respecting the treatment of women of rank; and, for this purpose, proposed to read extracts from the History of the Growth and Decay of the Ottoman Empire, by Prince Demetrius Cantemir. (1) The counsel for the defendant objected, that it would be first necessary to lay some ground for the production of this evidence; at least, it should be shewn, that the laws and customs of Constantinople were the same as those of Hindostan; and even then, they said, it might admit of considerable doubt, whether such a history could be admitted in evidence. After argument on the part of the managers of the Commons, the House of Lords informed them, that if the passage, which it was proposed to produce from Cantemir's History, went to prove an universal custom of the Mahommedan religion, the managers might read it. Two extracts from the book were accordingly read.

Upon a question as to the boundaries of two parishes, where it was admitted, on both sides, that the boundaries of the parishes and of the counties of Brecon and Glamorgan were conterminous, Nicholls's History of Breconshire was rejected. It was said, that the writer of that history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it, and that it was not like a general history of Wales. (2)

Documents not public.

A notarial protest under seal is not evidence that a

Ordinationibus Vicariorum has been received to prove an endowment. *Tucker v. Wilkins*, 4 Simons, 262.

(1) Extract from a report of the proceedings, on the impeachment, in the possession of T. Jones Howell, Esq., the editor of the valuable new collection of State Trials. The question occurred on the 22d of April, 1788. The point was referred to, by Lord Ellenborough, on the trial of General

Picton. See 30 Howell's State Trials, p. 492.

(2) *Evans v. Getting*, 6 C. & P. 586. See further, on the subject of histories as evidence, Lord Ellenborough's observations in Governor Picton's case, 30 Howell, 492. Chief Justice Jefferies, in *Lady Ivy's* case, refused to admit a printed history to show the date of the resignation of the Emperor Charles V., 10 Howell, 625.

foreign bill of exchange has been presented for payment in England. (1) A ship-protest is of itself only evidence to contradict the captain's testimony, and not to shew a variance between it and the condemnation. (2) The mere production of a diploma of a doctor of physic, under seal of one of the universities, is not sufficient evidence to shew that the party named in the diploma is entitled to that degree. (3) The sound-list, containing the account of the arrival of ships, is not evidence of that fact. (4)

Certificates are made evidence by statute in several cases, as, Certificates. for example, to prove a previous conviction for felony, or for uttering counterfeit money. (5) Certificates, upon matters of law mixed with fact, have sometimes been made the appropriate medium of proof, and conclusive evidence upon certain questions. (6) But, in general, a certificate of a mere matter of fact, not coupled with any matter of law, is not receivable in evidence. (7)

A certificate of the king, under his sign manual, has been By the crown. admitted, in an old case, as evidence of a fact, in a suit on a

(1) *Chesmer v. Noyes*, 4 Camp. 129.

(2) *Christian v. Coombe*, 2 Esp. 490. See 2 Evans's *Pothier*, 288.

(3) *Mories v. Thornton*, 8 T. R. 307.

(4) *Roberts v. Eddington*, 4 Esp. 88. Documents transmitted by British Consuls, stating the arrival of vessels at particular ports, are not evidence, *Roberts v. Eddington*, 4 Esp. 88, and see *Waldron v. Coombe*, 3 Taunt. 162. Entry of contracts for coals, under 47 Geo. 3, c. 68, not evidence against buyer, *Brown v. Capel*, M. & M. 374. As to the effect of a shipping entry at the Custom-house, see *Hughes v. Watson*, 1 Stark. 179. Books of receiver of duties on coals, *Weaver v. Prentice*, 1 Esp. 369. Entry in office for licensing stage-coaches, *Strother v. Wellan*, 4 Camp. 24. Returns of

sales of corn, under 1 and 2 Geo. 4, c. 87, not conclusive. *Woodley v. Brown*, 2 Bing. 527.

(5) See 1 Russ. on Crimes, b. 2, ch. 36. *Rex v. Watson*, R. & R. 468. Also the examples of copies of public or other documents, by authorized officers, *infra*.

(6) As to the certificates of bishops, *Omichund v. Barker*, Willes, 549. *Per De Grey*, Duchess of Kingston's case, 20 Howell, 339. Com. Dig. Certificate, and *vide supra*.

(7) Certificate of British Consul, *ex parte Church*, 1 D. & R. 324. Vice Consul *Waldron v. Coombe*, 3 Taunt. 162. *Roberts v. Eddington*, 4 Esp. 88. British merchants, *Rex v. Vyse*, and *Rex v. Spearpoint*, Forrest, 35. In coal trade, *Aldred v. Hallwell*, 1 Stark. 117. Veterinary College, *Sewell v. Corp*, 1 C. & P. 392. Agent at Lloyd's, *Drake v. Marryat*, 1 B. & C. 473.

promise of marriage; (1) the report states, that the certificate was allowed for proof, *without exception*. But it is laid down in Rolle's Abridgment, (2) "that the king, as it seems, cannot be witness in a cause, by letters under his sign manual." And Lord Chief Justice Willes, in his judgment in the case of *Omichund v. Barker*, (3) says, referring to this case in Hobart, "Even the certificate of the king, under his sign manual, of a matter of fact, has been always refused, except in one old case in Chancery."

Of minister.

A certificate under the seal of a minister abroad, as to the fact of a marriage having been solemnized before him, was admitted in an old case; (4) but the admissibility of such evidence has been questioned; (5) and it cannot be doubted, but

Of secretary at war.

that the evidence would now be rejected. A certificate from the secretary at war, as to the nature of the station of a sergeant in the army, is said to have been admitted, though opposed, in the case of *Loyd v. Woodall*, (6) but for what reason it was admitted, or upon what principle, is not stated. The general rule, is that our law never allows a certificate of a mere matter of fact, not coupled with matter of law, to be admitted as evidence. (7)

Of justices.

A certificate of justices, certifying that a highway, which is the subject of an indictment, is in a state of repair, is admitted, in common practice, as an adjudication of the state of repair, after a plea of guilty pleaded by the parish. (8) A protest, as to the presentment and non-acceptance, in a foreign country, of a foreign bill of exchange, attested by a notary-public, is evidence of those facts, in an action upon the bill: this is a relaxation of the strict rule, from a principle of general convenience. (9)

(1) *Abignye v. Clifton*, Hob. Rep. 213. See 3 Woodeson, Lect. 275.

(2) 2 Roll. Ab. 686 (H). Art. 1, citing the case of *Abignye v. Clifton*, *contra*.

(3) Willes, Rep. 550.

(4) *Alsop v. Bowtrell*, Cro. Jac. 541.

(5) Willes, Rep. 549.

(6) 1 Black. Rep. 29.

(7) By Willis, Ch. J., Willes's

Rep. 550.

(8) 6 T. R. 630, 635.

(9) Willes, 550. Anon. 12 Mod. 345. See further, as to the effect of a notary's certificate, Vin. Ab. Ev. p. 123. As to foreign notarial copies, *Brown v. Thornton*, 1 Nev. & P. 339. See *Cheamer v. Noyes*, *supra*, 606, as to presentments in England, as to proof of protests made abroad or in England. Chitt. on Bills, 405, 7th edit.

CHAPTER III.

ON THE PROOF OF WRITTEN EVIDENCE.

IT is proposed, in the first section of the present chapter, to treat of the proof of records and judicial proceedings; and in the next section, to treat of the proof of other public writings.

SECTION I.

Of the Proof of Records and Judicial Proceedings.

The admissibility and effect of records and judicial proceedings having been treated of in a former chapter, it remains to consider how they are to be proved, so as to render their contents receivable in evidence.

The peculiarity of the principle which governs the proof of the documents in question, is, that it is a deviation from the general rule, which requires the production of the best evidence. And the ground of this deviation is, that documents of great importance should not be subject to the loss that might be incurred if they were removable; and that the public should not be deprived of the use of their contents when wanted in several places at the same time. (1) Besides which, the danger of fabricating evidence in reference to such documents is very inconsiderable, in consequence of there being a ready access to the original instruments.

General principle.
Secondary evidence.

Of some records the Courts will take judicial notice. A distinction upon this subject exists with respect to the proof of public and private acts of parliament. Laws which concern the

Judicial notice.
Public acts.
Private acts.

(1) 1 B. & A. 185; Gilb. Ev. 8; Bac. Ab. Ev. 7.

king, the public, all spiritual persons, all officers in general, all traders, are public acts. But such as relate to the nobility only, or to the spiritual lords, or particular places, or particular trades, are private acts. (1)

This distinction between public and private acts is not applied, in collections of the English statutes at large, to any statutes before those of Richard the Third. After the public acts of the session have received the royal assent, a transcript of the whole is engrossed on parchment and certified by the clerk of the parliament, and deposited in the Rolls Chapel. The original act is kept in the parliament office. Enrolments of public acts certified and delivered into Chancery, are preserved in an uninterrupted series in the Rolls Chapel, from the beginning of the reign of Richard the First to the present time, except during the Commonwealth. Such of the rolls of parliament as are not in the Rolls Chapel are in the Tower of London, except a few of an early date in the Chapter House. Private acts are filed and labelled, and remain with the clerk of the parliament, and are not enrolled or deposited in the Rolls Chapel, though some of the earlier private acts are to be found there, and for a considerable time it was the practice to enrol in Chancery the titles to private acts. (2)

A private act may contain clauses of a public nature, and then the act, as far as those clauses are concerned, is to be regarded as a public act. Thus in the case of *Rex v. Utterby*, a clause relating to a public highway, occurring in a private inclosure act, was held by Mr. Justice Holroyd to be proveable in the same way as a public act. (3)

(1) Gilb. Ev. 39, 40; Runnington's Hale, H. of C. L. 15 and 16, n. Bac. Ab. Stat. F., with respect to decisions whether particular acts were public or private. M. & M. 191, stat. H. 8, relative to the College of Physicians. *Brett v. Beales*, 1 M. & M. 421, a Canal Act imposing Tolls. 2 Wms. Saund. 155, a. Stat. of Sheriffs' Bonds. If a private statute be afterwards recognised in a public Act, it will be

judicially noticed, *Samuel v. Evans*, 2 T. R. 575; Burr. 224.

(2) Preface to the Statutes, by the Commissioners of the Public Records.

(3) *Rex v. Utterby*, Lincoln, before Holroyd, J. See also Hob. 227. A stat. of 7 G. 3, for encouraging engraving, contains a private clause concerning Hogarth's widow.

Public acts of parliament are judicially noticed; and the printed statute is, in theory, used only for the purpose of refreshing the memory of the Courts. The regular proof of a private act of parliament is by an examined copy compared with the parliament roll.

In some acts of parliament, not relating to the kingdom at large, a special clause is often inserted, declaring them to be public acts, and that they shall be taken notice of as such, without being specially pleaded; in which case, they are to be proved in the same manner as public acts; it is not necessary to prove them by an examined copy, or to shew that the printed copy was printed by the king's printer. (1)

Private acts.
Public clause.

A clause was often formerly inserted in private acts, providing that they shall be printed by the king's printer, and that a copy so printed, shall be admitted as evidence of that act. In such cases, a copy, purporting to be printed by the king's printer, will be admissible in evidence; it is not necessary to prove that the act was purchased of the king's printer. (2)

The printed copy of an act is sometimes incorrect, in which case, the Court will be governed by the parliament roll, as in *Res v. Jeffries*, (3) where Keble's and Rastal's edition of the statutes were at variance, and in the case of *Spring v. Eve*, (4) where Keble's and Poulton's editions of a statute were found incorrect.

Act incorre

Next, with respect to the proof of records in Courts of Jus-

Judicial re
cords.

(1) *Beaumont v. Mountain*, 10 Bing. 404. *Woodward v. Cotton*, 1 Cr. M. & R. 44. Some difficulty for a time existed on this subject, in consequence of the report of the case of *Brett v. Beales*, M. & M. 421. See per Lord Lyndhurst, 1 Cr. M. & R. 47. The present form of enactment was adopted, in order to make the proof of the act being printed by the king's printer unnecessary, *ibid*.

(2) *Lincoln Summ. Ass.* 1832. By Park, J.

(3) 1 Str. 446.

(4) 2 Mod. 240; see also *Archer v. Holligstyle*, 185; *Price v. Hollis*, 1 M. & S. 105; the marginal note, sch. no. 18; 13 G. 3, c. 78, with respect to the divisions of sections in the printed copies of acts. See *Holroyd, J.*, 3 B. & C. 71, as to points. 1 Show. 210, as to the title of the act being a part of it. 1 W. Bl. 95; 1 Lord Raym. 77; *Ambl.* 20; 8 T. R. 165; 2 B. & C. 37; 3 B. & C. 18, 183; 8 B. & C. 466. The translation of the Statutes now commonly in use the date 1618.

Record in
issue.

tice, these may, for the reasons before stated, be proved by copies. Where, indeed, the existence of the record is the very point in issue, as upon an issue joined in the plea of *nul tiel* record, and the record belongs to the same Court wherein issue is joined, the record itself must be actually produced. But, even upon issue joined on such a plea, where the record is in another superior Court, the inconvenience of removing the originals is in some measure avoided, by obtaining the tenor of the record through the means of a *certiorari*, and *mittimus* out of Chancery. (1) If the record of an inferior Court is required in a suit before a higher tribunal, a *certiorari* may be issued out of the superior Court as well as from the Court of Chancery. (2) And in pursuance of this suit, where the superior Court sends for the record of an inferior Court, not for the purpose of seeing whether their proceedings are within the limits of their jurisdiction, but merely to know whether there be in fact such a record, it will be sufficient to certify the tenor, that is, a literal transcript of the record; but where the record itself is the subject of the proceedings in the superior Court, the original ought to be returned. (3)

Where a record is adduced in evidence, not upon an issue of *nul tiel* record, but merely in support of some allegation, and as such is submitted to a jury, it may in all cases be proved by a copy.

Copies under
seal.

Copies of records are of two kinds, under seal and not under seal: those under seal are either by exemplifications, or by inspeximus. Copies of records and judicial proceedings under seal, are considered as of higher credit than any sworn copy; for it is said, "Courts of Justice that put their seal to the copy, are more capable than a common person to examine, and more exact and critical in their examination." These copies under seal principally occur in the proof of letters patent, probates and letters of administration, and foreign judgments;

(1) *Luttrell v. Lea*, Cro. Car. 297;
Pitt v. Knight, 1 Saund. 98; *Hew-*
son v. Brown, 2 Burr. 1034.

(2) *Butcher and Aldworth's case*,

Cro. Eliz. 821; *Guilliam v. Hardy*,
1 Lord Raym. 216.

(3) *Woodcraft v. Kinaston*, 2

Atk. 307.

in the latter instance, they are, as will be shewn, the peculiarly proper evidence of acts of foreign Courts. (1)

In proving a record or judicial proceeding by a copy under seal, it is to be observed, that the seals of the king, and of the superior Courts of Justice, and of all Courts established by act of parliament, are admitted without extrinsic proof of their genuineness; judicial notice is taken of the seal of the county palatine of Chester, and of the seal of the Ecclesiastical Court on the exemplification of a will. (2)

An office copy of a record is a copy authenticated by a person trusted for that purpose, and it is admitted in proof upon the credit of the officer, without evidence of it's having been actually examined. The rule respecting the admission of office copies in evidence is, that an office copy is in the same Court and in the same cause equivalent to a record; but in another Court, or another cause in the same Court, the copy must be proved to be examined. (3) It seems that in the case of an issue out of Chancery, office copies of depositions in the same cause in the Court of Chancery are not receivable. (4)

(1) See B. N. P. 227; 3 Inst. 173; 10 Co. 93, a.; Sid. 145; Plowd. Com. 411; Hardr. 118. On the proof by constat or insepimus, see further, Vin. Ab. Ev. A. b. 44, p. 121; A. b. 25, p. 97. On the proof by exemplifications, *ib.* A. b. 33, p. 114.

(2) Tooker v. Duke of Beaufort, Sayer, 297; County Palatine Seal, Hardr. 120; Seal of Archbishop, Hardr. 118. Exemplification of fine or recovery in Wales or counties palatine, Clive v. Gwyn, 2 Sid. 145; see 10 Co. 93, a.; Sid. 146. Perhaps the distinction is not very precisely drawn between those seals which are admitted without proof of genuineness, and those which require such proof, *vide infra*, Seals of Private Courts and Corporations. On proof by the seals of Courts, see further, Vin. Ab. Evidence; A. b. 69, p. 132. As to the effect of a seal being broken off or nearly so, in the instance of administra-

tions, recoveries, certificates, and other instruments, and the effect of public documents being torn, see Vin. Ab. Evidence, A. b. 74, p. 136.

(3) Denn v. Fulford, 2 Burr. 1179; Black v. Lord Braybrooke, 2 Stark. 13; per Littledale, J., in Highfield v. Peake, M. & M. 111. It seems that the rule has not been strictly acted upon in regard to affidavits before the same Court, but not in the same cause, Wightwick v. Banks, Forrest, 153; Casburn v. Reid, 2 B. Moore, 60; Croke v. Dowling, B. N. P. 14; 3 Doug. 75, and see Salter v. Turner, 2 Camp. 87, office copy of answer. As to certified copies under the Insolvent Act, 7 G. 4, c. 57, Northam v. Latouche, 4 C. & P. 143. The printed rules of the Insolvent Court are evidence, Dance v. Robson, M. & M. 254.

(4) The point was decided in the *visi prius* case of Burnard v. Nerot,

Copies by authorized officer.

Besides office copies of the judicial proceedings of Courts, which according to the rule of Lord Mansfield are only admissible between the same parties in the same Court, office copies are admitted, in all Courts, of certain records of which it is the duty of particular officers, appointed by the law, to furnish copies. These are copies which it is the duty of the officer to make, and which he is not merely authorized by a particular Court to make for the convenience of suitors in that Court. It has been said upon the subject of such copies, that, where the law appoints any person for a particular purpose, the law must trust him as far as he acts under its authority. (1)

Chirograph.

The chirograph of a fine, for example, is evidence of the fine, the chirographer being appointed to give out copies of the agreements between the parties, which are entered of record. (2)

Enrolment.

An indorsement by the proper officer on a deed of bargain and sale, enrolled according to the form of the statute 27 H. 8, c. 16, is evidence of the enrolment: (3) and an indorsement of the date of enrolment, by the clerk of the enrolments, is part of the record, and conclusive as to the date. (4) So, where it became necessary for the plaintiff to show, in proof of his title, that a certain lease had been enrolled with the auditor of the Duchy of Lancaster, the Court of King's Bench held, that a memorandum of enrolment, on the margin of the lease, signed "A. B. auditor," was sufficient proof of the enrolment. (5)

1 C. & P. 580. In *Highfield v. Peake*, M. & M. 111, Littleale, J., expressed a different opinion, see B. N. P. 229.

(1) 1 B. N. P. 229.

(2) *Gibb. Ev.* 21; 2 *Starkie*, N. P. C. 13.

(3) By *Buller, J.*, in *Kinneraley v. Orpe*, 1 Doug. 56. It would seem that the signature of the certifying officer should be proved, unless where it is otherwise provided by statute, as by the Bankrupt Act, 2 & 3 W. 4, c. 114, s. 3. *Vide infra*, *Secondary Evidence of Private Writings*.

(4) *The King in aid of Reed v.*

Hopper, 3 Price, 495. The same rule, with respect to the date of the enrolment of a memorial of annuity deeds; *Garrick v. Williams*, 3 Taunt. 540.

(5) *Kinneraley v. Orpe*, 1 Doug. 56. An examined copy of the memorial of an assignment of a judgment (the memorial being required by act of parliament) is evidence of the fact of assignment. And an examined copy of the memorial of the registry of a deed, is evidence of the fact of the registry. *Hobhouse v. Hamilton*, 1 Scho. & Lef. 207.

Where the officer of the Court is only entrusted with the custody of records, and is not authorized to make out a copy, he has no more authority for that purpose than a common person; and the copy must be regularly proved in a strict and regular mode. A copy of a judgment, though purporting to be examined by a clerk of the Treasury, is not admissible, without proof of it's having been examined; because it is no part of the necessary office of the clerk to deliver a copy; he is only entrusted to keep the records for the benefit of public perusal, and not to make out copies of them. (1) If a deed enrolled be lost, a copy of the enrolment, made out by the clerk of the peace, but not proved to be examined, is not admissible. (2) And where a fine is to be proved with proclamations, the proclamations ought to be examined with the roll; for though the chirographer is authorized to make out copies of the fine itself, he is not appointed to copy the proclamations. (3)

Copy by officer unauthorized.

Judgment.

Enrolment.

The more usual way of proving the records of the superior and inferior Courts of this country is by means of examined copies and office copies. The proof by an examined copy is by producing a witness who has compared the copy, line for line, with the original, or who has examined the copy while another person read the original: the latter mode of examination will suffice, without the witness examining the original both ways, or calling both persons engaged in the examination; for it will not be presumed, that a person wilfully misread the record. (4) And it appears not to be necessary, that the person reading the record aloud should be the officer of the Court. (5) But it ought to be shewn, that the original came from the proper place of deposit, or out of the hands of the officer, in whose custody the records are kept. (6)

Examined copy.

(1) Bull. N. P. 229.

(2) *Ibid.*

(3) Gilb. Ev. 21; Allen's case, B. N. P. 229; 3 Taunt. 166; Doe v. Bluck, 6 Taunt. 486. S. P.

(4) Reid v. Margison, 1 C. 469; Rolf v. Dart, 2 T. R. 52; Fyson v. Kemp, 6 C. & P. 72; Gyles v. Hill, 1 Camp. 469; McNiel v. London, (Sheriffs) 1 Esp. 263.

(5) By Lawrence, J., in Eccles

v. Hill, 1 C. 471, n.

(6) Adamthwaite v. Synge, 1 Stark. 183, 4 Camp. 372. It was there held, that in order to prove an examined copy of an Irish judgment, it was not enough for the witness to say, that he examined the copy with a record produced to him in a room over the Four Courts at Dublin, where the records of the superior Irish Courts are kept,

Judgment on
paper.

Judgment
book.

Prothonotary's
book.

Minutes.

The minutes from which a record is afterwards made up, or the copies of such minutes, are not equivalent to an examined or office copy of the record, nor are they proper evidence of the record. Thus, it has been held, that a judgment in paper, signed by the Master, is not evidence; though upon such judgment execution may be taken out: for it is not yet become permanent, and is removable from place to place. And a judgment will not be regularly proved by the judgment book of the Court, though the record of the judgment roll has not been made up, and though the party interested in the proof of the judgment were not a party to the suit in which the judgment was obtained. Records are not complete, until they are delivered into Court in parchment, and there fixed as the rolls of the Court. In a case, where there had been an interlocutory judgment, an inquisition, final judgment and execution, it was held that both judgments must be proved by an examined copy of the roll, which must be carried in; and that it was not enough to produce entries in the prothonotary's book, and the inquisition, with the prothonotary's *allocatur*. (2) The day-book, kept at the judgment office, is not evidence to prove the time of signing a judgment. (3) In like manner, a minute book in which entries of proceedings at a Court of Quarter Sessions are made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record, so as to be admissible in evidence. (4) Nor is such a minute-book evidence of the finding of a bill of indictment, though no record in fact be drawn up. (5) But the minutes of a Court may be received, where the matter proved by the minutes occurs before the same Court sitting under the same commission; as upon the trial of Horne Tooke, where the minutes of the Court were received to prove the acquittal of Hardy. (6)

without seeing whence the record was taken, or knowing the person who produced it to be an officer of the Court.

(1) B. N. P. 228; *Godefroy v. Tay*, 3 C. & P. 192; *Ayrey v. Davenport*, 2 N. R. 474.

(2) *Godefroy v. Jay*, 3 C. & P. 192.

(3) *Lee v. Meacock*, 5 Esp. 177.

(4) *Rex v. Bellamy*, R. & M. 171; *Rex v. Ward*, 6 C. & P. 366, to prove an allegation that an appeal came on to be heard.

(5) *Rex v. Smith*, 8 B. & C. 341; *Porter v. Cooper*, 6 C. & P. 354.

(6) 25 St. Tr. 446. By Lord Tenterden, 6 B. & C. 342. When an ancient record has been lost, an old copy has been allowed to be

The existence of an ancient record may sometimes be established by presumptive evidence. The presumption, that a record has existed and has been lost, must depend upon the facts proved, both with respect to its actual existence, and also with respect to its custody, which may admit of a greater or less probability of a loss. It does not appear, that the existence and loss of records of the Superior Courts have been presumed; but it appears, from the instances before cited, in the chapter on Presumptive Evidence, that even acts of parliament may be presumed. An unexamined copy of a recovery of lands in a Court of ancient demesne has been received, where the recovery, if it existed, must have been ancient, and where the possession was proved to have gone a long time according to the recovery. (1) So a license to appropriate has been presumed. (2) And where it appeared that the records of the city of Bristol had been burnt, an exemplification of a recovery of houses in Bristol, under the town seal, has been allowed in evidence. (3)

Lost record
presumed.

Upon ejectment for the recovery of a rectory, to which a recusant had presented, it was held, that the record of conviction, which was proved to have been burnt, might be proved by estreats in the Exchequer, and an inquisition of the recusant's lands returned there. (4) So, in an action of trover, secondary evidence has been admitted of a *fieri facias*, and a *venditioni exponas* proved to have been lost. (5) And similar proof has been allowed of the decree in the time of Henry the Eighth for title in London, that decree having been lost. (6) "In such cases," says Chief Baron Gilbert, "the instrument must be, according to the rule of the civil law, *vetustate temporis aut judiciaria cognitione corroboratum*." (7) This subject has been more fully considered in treating of presumptive evidence.

given in evidence, without proof of its being a true copy. *Anon.* 1 Vent. 257; B. N. P. 228. In a recent case respecting the repair of Kelham Bridge, a discussion arose concerning the admissibility of examined copies of the *controlment* rolls, and concerning the effect of these rolls in evidence.

(1) *Anon.* Vent. 257; B. N. P.

228; *Greene v. Ronde*, 1 Mod. 117.

(2) So stated by Hale, C. J., 1 Mod. 117; Hardr. 323.

(3) 1 Mod. 117.

(4) *Knight v. Danter*, Hardr. 323; Salk. 285.

(5) Hardr. 323.

(6) See *Macdowgal v. Young*, Ry. & M. 393; B. N. P. 228.

(7) Gilb. Ev. 19.

Judgment of
lords.

Judgments in the House of Lords may be proved by examined copies of the minutes of the judgment entered in the journals. The minutes of a judgment are the judgment itself, which it is not the practice to draw up in form. (1)

Judgment.
Verdict.

A verdict is frequently given in evidence for the purpose of shewing the opinion of a jury on certain points in issue; as, for example, where a jury, upon some former trial, have found matter of reputation, or have decided a particular right. In such cases, though it is the verdict and not the judgment which is relevant to the inquiry, still it seems to be necessary to produce a copy of the judgment founded upon the verdict. It has been considered that the production of the *postea* alone is not sufficient; for the judgment may have been arrested, or a new trial may have been granted. (2)

Postea.

It has been held, that a *nisi prius* record, with the *postea*, or with a minute of the verdict indorsed by the officer of the Court on the Jury pannel, is good evidence that the cause came on for trial, though no regular *postea* be indorsed. In London and Westminster it is not the practice for the officer at the trial to indorse the *postea*, as it is in the country. (3) So the *nisi prius* record and *postea* have been held sufficient to support a plea of set off on an action for contribution. (4) The *postea*

(1) *Jones v. Randall*, Cowp. 17, action on a wager, whether a decree in Chancery would be reversed? An unstamped copy of the minutes of reversal is evidence, without more of the proceedings.

(2) *Pitton v. Walter*, 1 Str. 162. B. N. P. 234. Unless in the case of an issue out of Chancery, when no judgment is entered, B. N. P. 234.

(3) *Rex v. Browne*, 1 M. & M. 315, after consulting the other Judges of K. B. In *Rex v. Browne*, there was a general verdict entered in the minute against all the defendants. It being necessary to show that a particular defendant had been acquitted, it was held that this might be done by parol evidence, that he was examined as

a witness.

(4) *Garland v. Scoones*, 2 Esp. 648. *Foster v. Compton*, 2 Stark. 365. It was doubted, whether the indorsement of the costs, with the Master's allocatur on the *postea* was sufficient to entitle the plaintiff to recover half of the costs, without producing the judgment. These decisions appear liable to the objection, that the judgment may have been arrested, or a new trial granted; but this possibility would not be likely to be attended with any practical or general inconvenience. See *Harrop v. Bradshaw*, 9 Price, 359, where, in consequence of an arrangement, no judgment was entered up. That the day of trial, and the fact that the cause was carried down to

is sufficient evidence to introduce the testimony of a witness who is dead, (1) or that of a person indicted for perjury. (2)

A decree in the Court of Chancery may be proved by an exemption under the seal of the Court, or by an examined copy, or by a decretal order in paper, with proof of the bill and answer. (3) But it has been held, that the bill and answer need not be proved, if they are recited in the decretal order. (4) And it is said in a book of authority, (5) that if a party wants to avail himself of the decree only, and not of the answer, the decree, under the seal of the Court and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to show, that the point in issue was not the same as the present issue. However, the rule, generally laid down, seems to be, that, where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact, (as, that a decree was made by the Court,) he ought regularly to give in evidence the proceedings upon which the decree is founded. "The whole record," says Chief Baron Comyns, "which concerns the matter in question, ought to be produced." (6) So, a sentence in the Admiralty Court may be evidence, upon the libel and answer produced: and a judgment in a Court-baron, or other inferior Court, with proof of the proceedings in which the judgment was given." (7)

Decree in
Chancery.

trial, must be proved by the record, *Thomas v. London (sheriffs)*, 6 Esp. 80. *Parry v. Collis, Peake*, add. A. 47.

(1) B. N. P. 243; 1 Str. 162. 2 Russ. on Crimes, 549. See also *Barnard*, 243; *Hardr.* 118; 2 Hawk. c. 46, s. 56.

(2) *Iles's case*, ca. temp. *Hardr.* 1818; *Browne's case*, M. & M. 314. See *Coppard's case*, M. & M. 118, where the *postea* stated the trial to have been before the Chief Justice, it being, in fact, before a Judge sitting for the Chief Justice; the objection was overruled. See *Alford's case*, 1 Leach, 150, per-

jury at assizes, the captain stating the names of both Judges. *Lincoln's case*, R. & R. 421, *id.*

(3) *Trowell v. Castle*, 1 Keb. 21. Com. Dig. Ev. (C. 1.) mentioned by *Bayley, B.*, in *Blower v. Hollis*, 1 Cr. & M. 396.

(4) By *Trevor, Ch. J.*, in *Wheeler v. Lowth*, cited Com. Dig. Ev. (C. 1), 1 Keb. 21, *contra*.

(5) Bull. N. P. 235, citing *Lord Thanet v. Paterson*, K. B. East; 12 G. 2.

(6) Com. Dig. tit. Ev. (A. 4), p. 85.

(7) Com. Dig. tit. Ev. (C. 1), p. 94.

If the fact to be shown were merely, that a decree has been made in the Court of Chancery, or that a decree made there has been reversed on appeal, proof of the previous proceedings will not be necessary. (1) And in the case of an ancient decree, if the bill and answer cannot be found after proper search, the decree alone may be admitted.

Answer in
Chancery.

An answer in Chancery may be proved by an examined copy. (2) It cannot regularly be given in evidence without proof of the bill; for the bill may materially tend to explain the answer. But if there be proof, by the proper officer, that the bill has been searched for in the office, and cannot be found, the answer has been allowed to be read without sight of the bill. (3) When an answer is offered in evidence as an admission of the party on oath, or when it is used for the purpose of contradicting a witness, or upon an indictment for perjury in the answer, it will not be necessary to shew that there has been any decree in the suit. (4)

In civil suits, an answer in Chancery may be proved by an examined copy; (5) but it is said, that, upon an indictment for perjury, the original must be produced, and such is the practice, though there does not appear to be any sufficient reason for the distinction. (6)

In civil suits it will be presumed that an answer was made upon oath; (7) but, in criminal prosecutions, some evidence of the administration of an oath is required; as, that an individual

(1) See *Jones v. Randall*, Cowp. 17. See per Bayley, B., in *Blower v. Hollis*, 1 Cr. & M. 396. Lord Thanet *v. Patterson*, B. N. P. 235.

(2) *Hennel v. Lyon*, 1 B. & A. 182. *Ewer v. Ambrose*, 4 B. & C. 25. See *Rees v. Bowen*, 1 M. & Cl. & Y. 383. *Highfield v. Peake*, M. & M. 110. See *Salter v. Turner*, 2 Camp. 87. *Burnard v. Nerot*, 1 C. & P. 578, as to office copies of answers.

(3) *Gilb. Ev.* 55.

(4) *Lady Dartmouth v. Roberts*,

16 East, 334. *Ewer v. Ambrose*, 4 B. & C. 25.

(5) B. N. P. 238, 239. *Hennel v. Lyon*, 1 B. & A. 182. *Ewer v. Ambrose*, 4 B. & C. 25. *Lady Dartmouth v. Roberts*, 16 East, 234.

(6) B. N. P. 238, 239. As to the practice of the Court of Chancery in letting out the record, *Jervis v. White*, 8 Ves. 313.

(7) B. N. P. 238, 239. See *James's case*, 1 Show. 327. *Crook v. Dowling*, 3 Doug. 77.

was sworn, who is identified with the defendant. The fact of swearing may also be proved by evidence of the Master's handwriting to the jurat, and it will not be necessary to call the Master. (1) The jurat is also evidence of the place at which the oath was taken. (2) This strictness of proof is required not only in criminal proceedings, as on a trial for perjury, but also in actions which are in the nature of a criminal proceeding, as in an action for a malicious prosecution. (3)

When an original answer or an examined copy is given in evidence, some proof of the identity of the party will be requisite. (4) It was to facilitate the proof of identity upon trials for perjury, that an order was made in Chancery, requiring answers to be signed. (5) And when the original answer is produced, the proof of the handwriting will be a proper and easy method of identifying the party. (6) If an examined copy is given in evidence, the identity must be established by extrinsic evidence. It may be proved by a person who can speak to the signature to the original answer, (7) although the original is not produced at the time he speaks.

(1) *Rex v. Morris*, 2 Burr. 1189. Str. 1043. *Rex v. Benson*, 2 C. 508.

(2) *Rex v. Spencer*, R. & M. 97.

(3) *Spencer's case*, R. & M. 98; 16 East, 340. On the evidence in indictments for perjury, committed in the course of judicial proceedings, see *Roscoe's Criminal Evidence*, p. 676. 2 Russ. on Crimes, p. 548. *Hailey's case*, 1 C. & P. 258, perjury in affidavit, signed by mark. *Laycock's case*, 4 C. & P. 326, perjury in answer to a bill afterwards amended. The jurat is not conclusive evidence as to the place, *Embsden's case*, 9 East, 437.

(4) B. N. P. 238, 239.

(5) *Rex v. Morris*, 2 Burr. 1189.

(6) *Rex v. Benson*, 2 C. 508. *Rex v. Morris*, 2 Burr. 1189.

(7) *Dartnell v. Howard*, R. & M. 169. *Scott v. Lewis*, 7 C. & P. 349, where a *cognovit* was proved by the like evidence; see also as to the proof of identity. *Hennel v. Lyon*, 1 B. & A. 182, coincidence of name and character. *Hodgkin-*

son v. Willis, 3 Camp. 401, proof of person against whom bill filed. The leaning of the Courts is in favor of relieving parties from the onus of the proof of identity, at least in civil cases, as it is a fact, which, in general, is more easy to be disproved than established. Per Lord Tenterden, *Hennel v. Lyon*, 1 B. & A. 182. At Nottingham Spr. Ass. 1830, indictment for perjury in justifying bail. The chief evidence was a petition and schedule in the Insolvent Court stating the defendant's property; a certified copy was produced, under the act, and it was held by Garrow, B., that the identity did not sufficiently appear upon the face of the proceedings, and the defendant was, on that ground, acquitted. See also *Burnand v. Nerot*, 1 C. & P. 578, where the copy of answer was adduced to contradict a witness, and was rejected on the ground of the identity not being proved. With respect to the proof of identity in parish registers, *vide supra*. In

Records.
Criminal
courts.

With respect to the proof of records before Courts of criminal justice, as where a prisoner pleads *autre fois acquits* to an indictment, he may remove the record by *certiorari* into Chancery, and have it exemplified; but it seems to be the usual practice for the clerk of assize or clerk of the peace to make up the record, and to attend with it without writ. (1)

Ecclesiastical
sentences.

With respect to the proof of proceedings in the Ecclesiastical Courts, it has been held, that the minute-book of the Ecclesiastical Court is sufficient evidence of a decree for alimony pronounced in that Court, without such decree being drawn up in form; it appearing that, in practice, nothing more is done with the minutes, unless where alimony is not paid. (2) The practice of the Ecclesiastical Court is a matter to be proved by evidence, and to be left to a jury. (3)

Inferior courts.

Where the judgment of an inferior Court is offered in evidence, it is usual to produce the book containing the proceedings from the proper custody. (4) But as the proceedings are not usually made up in form, the minutes will be admitted, if they are perfect, and omit nothing material; (5) so it seems,

the proof of the execution of deeds, *Parkins v. Hawkshaw*, 2 St. C. 239; B. N. P. 171; 4 C. 34. In the proof of identity of indorsees to Bills of Exchange, *Bulkeley v. Butler*, 2 B. & C. 441 (2 C. 5). *Mead v. Young*, 4 T. R. 28, in the proof of handwriting when a subscribing witness is dead. *Nelson v. Whittall*, 1 B. & A. 19. *Wallis v. Delaney*, 7 T. R. 266. *Page v. Mann*, 1 M. & M. 79. *Kay v. Brookman*, 1 M. & M. 206. *Mitchell v. Johnson*, 1 M. & M. 176. On the proof of identity upon the plea of *autrefois acquits*, see 2 Russ. on Crimes, 721. *Vide infra*, proof of private writings. See further on the proof of identity in indictments for perjury, *Brady's case*, 1 Leach, 330; *Price's case*, 323.

(1) See 2 Russ. on Crimes, 720, n. See *ib.* 721, n., on the *onus probandi* of the identity, on a plea of *autre fois acquits*. As to what are the requisites for making a

criminal record complete, see *Belamy's case*, R. & M. 172. *Smith's case*, 8 B. & C. 341. *Cooke v. Maxwell*, 2 Stark. 183. *Porter v. Cooper*, 6 C. & P. 354. *Ward's case*, 6 C. & P. 366; *Bowman's case*, 6 C. & P. 101.

(2) *Howleston v. Smyth*, 2 C. & P. 25.

(3) *Beauvain v. Scott*, 3 Camp. 388.

(4) It seems that evidence should be given of the proceedings previous to the judgment, *Com. Dig. tit. Evidence*, c. 3. *Fisher v. Lane*, 2 Bl. 836. *Arundel v. White*, 14 East, 216.

(5) *Fisher v. Lane*, 2 Bl. 834. *Holt, Ch. J.*, in *Rex v. Hains*, *Comb.* 337; 12 *Vin. Ab.* A. b. 26. Per Lord Tenterden, in *Rex v. Smith*, 8 B. & C. 342. *Arundel v. White*, 14 East, 216, where the entry was "withdrawn by plaintiff's order" opposite the plaintiff. *Macnally's case*, 9 Co. 69, where

that examined copies of the minutes would be evidence. (1) If the proceedings of the inferior Court are not entered in the books, they may be proved by the officer of the Court, or by some other person conversant with the fact. (2) As the Court of Quarter Sessions is a Court of oyer and terminer, the minute book kept by the clerk of the peace is not evidence of a conviction or acquittal. The caption is a necessary part of the record, and the record itself, or an examined copy, is the only legitimate evidence to prove it. (3)

By a provision in the Insolvent Act, 7 Geo. 4, c. 57, certified copies of the proceedings of the Insolvent Act are made admissible in all Courts. (4) But this provision does not take away the right of producing in evidence the original proceedings. (5)

Insolvent
courts.

In an action upon a judgment of a Court of a foreign country, if the judgment is subscribed by the Judge of the Court, and has a seal affixed, it must be proved by proving the handwriting of the Judge, and the authenticity of the seal. (6) If a colonial Court possess a seal, it ought to be used for the purpose of authenticating its judgments, although it may be so much worn as no longer to make any impression. (7) If it is clearly proved, that the Court has not any seal, so that the document cannot be clothed with the form of a legal exempli-

Foreign judg-
ment.

Seal.

there was a brief note of the plaint. See *Pitcher v. Rinter*, 12 Vin. Ab. A. b. 48.

(1) Per Holt, Ch. J., in *Rex v. Hains*, Comb. 337.

(2) See *Dyson v. Wood*, 3 B. & C. 451, 453.

(3) *Rex v. Smith*, 8 B. & C. 343, and see *Rex v. Bellamy*, *ib.* *Rex v. Thring*, 5 C. & P. 507. *Porter v. Cooper*, 6 C. & P. 354, where the original indictment, with the words "true bill" indorsed, was held not to be evidence of a finding by the grand jury. *Rex v. Ward*, 6 C. & P. 367, that the minute book is not evidence to prove that an appeal came on to be tried, *Bowman's case*, 6 C. & P. 101.

(4) *Andrew v. Pledger*, 1 M. &

M. 508. *Delafield v. Freeman*, 6 B. 294.

(5) *Northam v. Latouche*, 4 C. & P. 140, as to the proof of proceedings under the Bankrupts' Acts. See 2 and 3 W. 4, c. 114; 1 and 2 W. 4, c. 56; see *ib.* as to the seal of the Bankruptcy Court, and the handwriting of the certifying officer.

(6) *Henry v. Adey*, 3 East, 221. *Buchanan v. Rucker*, 1 Camp. 63, where the witness swore to the handwriting of the Chief Justice, and said that he would have acted upon the seal. *Flindt v. Atkins*, 3 Camp. 215.

(7) *Cavan v. Stewart*, 1 Stark. N. P. C. 525.

cation, it must be shewn to possess some other requisite to entitle it to credit; (1) as, by proving the signature of the Judge upon the judgment. (2)

Proof of foreign judgment.

An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the Court, is evidence of the judgment in the Courts of this country. (3) But a document, purporting to be a copy of a judgment, and to be made by the officer of the Court, is not admissible. (4)

In *Alison v. Furnival*, (5) it was held, that an agreement of reference made in France, was sufficiently proved by an examined copy, together with the evidence of the attesting witness, it appearing that the original was deposited with a notary in Paris for safe custody, and that it is the established usage in France not to allow the removal of a document so deposited.

Proof of foreign laws.

The existence of a foreign law is a fact to be proved, like any other fact, by appropriate evidence. Without such proof, our Courts cannot take notice of foreign laws. (6) The written law of a foreign state is to be proved by a copy of the law, properly authenticated. (7) The unwritten law of a foreign state,

(1) 2 Starkie, N. P. C. 11.

(2) *Alves v. Bunbury*, 4 Camp. 28. It seems that an examined copy would suffice, per Lord Ellenborough, 6 M. & S. 36. An examined copy of an Irish judgment is sufficient, see *Adamthwaite v. Synge*, 1 Camp. 183.

(3) 2 Starkie, N. P. C. 11, 12, by Lord Ellenborough and Bayley, J.

(4) *Appleton v. Lord Braybrooke*, 6 Maule & Selw. 34. 2 Starkie, N. P. C. 6, 7, S. C.

(5) 1 Cr. M. & R. 277. The usage was not a provision of the written law; but it was considered that secondary evidence was, in general, admissible, where it was out of the power of the party to produce the original. There was much discussion as to whether there was a duplicate original; this, however, was not satisfactorily proved. *Vide infra*, *Secondary Evidence of Writings*.

It seems that where a person is authorized by the law of a foreign country to give official copies of private documents, that the Courts of this country will not recognise such copies, see *Brown v. Thornton*, 1 Nev. & P. 343. It was said, in that case, to have been established by the cases of *Appleton v. Lord Braybrooke*, and *Black v. Lord Braybrooke*, that the Courts of this country will not adopt the rules of evidence of foreign Courts.

(6) 1 P. Wms. 431; 3 Ves. & Beam. 29. *Ganer v. Lady Laneborough*, Peake, N. P. C. 17.

(7) *Gen. Picton's case*, 30 Howell's St. Tr. 491. *Boetlinck v. Schneider*, 3 Esp. N. P. C. 58. In *Clegg v. Levy*, 3 Camp. 166, the evidence of a merchant of Surinam was rejected, as to the necessity of a foreign stamp, it appearing that there was a written law; for the law, on inspection, might contain

(having first been ascertained to be part of the unwritten law, by witnesses professionally conversant with the laws of the state,) may be proved by the parol evidence of witnesses possessing competent professional skill. (1) In the judgment, delivered in the Consistory Court of London, in the case of *Dalrymple v. Dalrymple*, (2) Sir W. Scott, after observing, with reference to the law of marriage in Scotland, that the determination of the question must be taken from the authorities of that country, proceeds thus,—“The authorities, to which I shall have occasion to refer, are of three classes; first, the opinions of the learned professors, given in the present or similar cases; secondly, the opinions of eminent writers, as delivered in books of great legal credit and weight; and thirdly, the certified adjudication of the tribunals of Scotland upon these subjects. I need not say, that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court, which has to weigh them, *stare decisis*.”

If a question should arise, with respect to a colony, whether the law of the mother-country is the law of the colony, the statement of text-writers may be admitted. In General Picton's

Law of colony.

exceptions. *Miller v. Heinrick*, 4 Camp. 155. In the case of *Boehtlinck v. Inglis*, 3 East, 381, the counsel for the plaintiff, after proving one of the mercantile navigation laws of Russia, offered in evidence a certificate (signed by the presiding Judge of the Custom-house Court in Russia, and bearing the seal of the Court), which purported to have been delivered by the Judges to the plaintiff, with reference to the suit then commenced in this country; the certificate set out the navigation law, and contained the opinion of the Judges of the Custom-house Court on it's construction: the plaintiff's counsel insisted, that the certificate was admissible in evidence, not simply as a report of the opinion of Court, but as an adjudication of the law certified under the

seal of Court, and entitled to the same credit as the exemplification of a foreign judgment. On the other side, it was argued, that the certificate was merely a parol exposition of a written law, and entirely extra-judicial; and therefore not admissible. The Court of King's Bench decided the case upon other points, and did not express any opinion upon the question, as to the admissibility of the proposed evidence. The case of *Middleton v. Janverin*, in the Consistory Court of London, reported by Dr. Haggard, vol. ii. p. 442, may be referred to upon this subject.

(1) *Miller v. Heinrick*, 4 Camp. 155. See 3 Esp. N. P. C. 58.

(2) Dr. Haggard's Reports, vol. ii. p. 81.

case (1), where such a question was suggested as likely to occur, Lord Ellenborough said, "The text writers furnish us with their statement of the law; and that would certainly be good evidence, upon the same principle as that which renders histories admissible. There is a case," continued Lord Ellenborough, "in which the history of the Turkish empire by Cantemir was received by the House of Lords, and received after some discussion; I shall therefore receive any book that purports to be a history of the common law of Spain."

Commercial
regulations.

Acts of state.

The practice of a Court of Justice in a foreign country may be proved by witnesses professionally acquainted with that practice. (2) The commercial regulations of a foreign country ought to be proved by well-authenticated copies of such regulations. (3) The acts of state, also, of a foreign government can only be proved by copies of such acts properly authenticated. Thus, in the case of *Richardson v. Anderson*, (4) where the counsel on the part of the defendant proposed to give in evidence a book purporting to be a collection of treaties concluded by America, and to be published by the authority of the American government; and it was proposed, further, to prove, by the American minister resident at this Court, that the book produced was the rule of his conduct; this evidence was offered, as equivalent to a regular copy of the archives in Washington: but Lord Ellenborough rejected the evidence, and held that it was necessary to have a copy examined with the archives.

In the case of *Lacon v. Higgins*, (5) Lord Tenterden admitted a copy of the civil code of France, produced by the French Vice Consul, who declared that it was an authentic copy of the law of France, upon which he acted at his office;

(1) 30 Howell's St. Tr. 492.

(2) *Buchanan v. Rucker*, 1 Camp. 66.

(3) By Lord Ellenborough, in *Gen. Picton's case*, 30 Howell's St. Tr. 491.

(4) 1 Camp. 65 (a).

(5) 2 Stark. 178. Lord Tenter-

den t afirst, inclined in favor of the objection, but afterwards overruled it on the authority of *Picton's case*. It would seem, however, that the book in *Picton's case* was cited for a point of unwritten law; and see *Clegg v. Levy*, 3 Camp. 166.

that it was printed at the office for printing the laws of France, and that it would be acted upon in any of the French Courts. In *Ganer v. Lady Lanesborough*, (1) Lord Kenyon permitted a party divorced to give parol evidence of her divorce, according to the ceremony and custom of the Jews at Leghorn.

In an action upon an award, it is necessary to prove both the submission and the execution of the award. And, in general, whether the validity of the award comes in question directly, or only incidentally, the submission of all the parties should be regularly proved. (2) If the submission was to two arbitrators, named in the reference, and to a third person to be appointed by them, the appointment of such person to be umpire must be duly proved. A recital of such appointment in the award, signed by the three, will not be sufficient; nor will it be enough to shew that the third person acted with the other arbitrators, and signed the award. (3)

Award.

When an inquisition is offered in evidence, the commission under which it was taken ought regularly to be proved, or shewn to be lost. But in cases of more general concern, such

Inquisition.

(1) *Peake*, 17. It was also held, that an instrument purporting to be a divorce under the seal of the Synagogue, was not admissible, without previous proof of the law of the country. See further, on the proof of foreign laws, *Male v. Roberts*, 3 Esp. 163. *Brown v. Gracey*, 1 D. & R. 41. *Mostyn v. Fabrique*, Cowp. 174. *Mace v. Kay*, 4 Taunt. 43. *Burrows v. Jemimo*, 2 Str. 733. *Fremoult v. Dedire*, 1 P. Wms. 429. *Feanbert v. Turet*, 1 Brown, P. C. 38. *Lindo v. Belisario*, 2 Hagg. 248. *Midleton v. Janvers*, 2 Hagg. 441. *Horford v. Morris*, 2 Hagg. 431. Where evidence of the law of Scotland was required, the testimony of a witness, who was a tobacco-nist, was rejected, *Asow*, cited 10 East, 287. On the trial of the *Wakefields*, for abduction, a gentleman of the Scotch bar was ex-

amined as to the point, whether the marriage, as proved by the witnesses, would be a valid marriage according to the law of Scotland, *Murray's ed.* p. 238. In *Alivon v. Furnival*, 1 Cr. M. & R. 282, a French advocate and a French notary were examined, as to the usage in France on various points of evidence.

(2) *Antram v. Chace*, 15 East, 209. *Ferrer v. Oven*, 7 B. & C. 427. *Brazier v. Jones*, 8 B. & C. 124. As to proof of submission by rule of Court, *Still v. Halford*, 4 Camp. 17. Proof of enlargement, *re Hick*, 8 Taunt. 694. *Halden v. Glasscock*, 8 D. & R. 151. *Lawrence v. Hodgson*, 1 Y. & J. 16. As to proof of an award, under an Inclosure Act, see *Rex v. Haslingfield*, 2 M. & S. 558.

(3) *Still v. Halford*, 4 Camp. 19.

as the ecclesiastical surveys, the commissions are of such public notoriety as not to require proof. (1)

Depositions in
Chancery.

With regard to the proof of depositions in Chancery, the general rule is, that they are not to be admitted in evidence without proof of the bill, and answer: (2) for, if there do not appear to be a cause depending, the depositions are considered to be mere voluntary affidavits; and the bill and answer ought to be produced, in order to shew who were the parties to the suit, and what the points in issue, as depositions in general are evidence only upon the same points, and between the same parties, or those who claim under the parties. But depositions may be read without such antecedent proof, if they are so ancient, that no bill or answer can be forthcoming; formerly it was not the practice to enrol bills and answers. (3) And if the defendant is in contempt, or has had an opportunity of cross-examining, which he chose to forego, the depositions may then be read, after proving the bill, although no answer has been

Lost bill and
answer.

(1) Vin. Ab. Ev. A. b. 42. B. N. P. 228. *Hardcastle v. Sclater*, 2 Gwill. 787. *Vicar of Kellington v. Trinity College*, 1 Wils. 170. *Rowe v. Brenton*, 8 B. & C. 747, an inquisition taken under the statute 4 Edw. I. was received, though the commission could not be found. The originals of some of the Parliamentary Surveys having been destroyed in the fire of London, copies from unsuspected repositories have been admitted, *Underhill v. Durham*, 2 Gwill. 542. *Buller v. Michell*, 4 Dow. 325. *Greene v. Proude*, 1 Mod. 117. In *Anderton v. Magawley*, 3 Bro. P. C., an old inquisition, *post mortem*, was read without producing the commission; but it was held to be necessary to prove that such a commission did actually issue. In *Alcock v. Cook*, tried before Tindal, Ch. J., in London, a survey from the office of the Duchy of Lancaster was admitted, though the commission was not extant. It purported to be signed

by the Commissioners, it came from the proper custody, and was proved to be of the handwriting of the age.

(2) Gilb. Ev. 56. Bull. N. P. 240. *Nightingale v. Devisme*, 5 Burr. 2594, *ad fin.* *Baker v. Sweet*, Bunb. 91. Raym. 335. Vin. Ab. Ev. A. b. 31. When bill dismissed, 2 P. Wms. 162. *Illingworth v. Leigh*, 4 Gwill. 1619. At the trial of the last-cited case, Mr. Justice Heath refused to admit depositions in evidence, because the bill and answer had not been duly proved, nor inquired after. But it is said by the reporter, that the rejection of this evidence was one of the grounds upon which a new trial was afterwards granted. And see *Byam v. Booth*, 2 Price, 234, n. In a cause respecting the Retford Charity Lands tried at Nottingham, Chief Justice Tindal and Little- dale, J., rejected depositions, because the decree was not produced.

(3) *Byam v. Booth*, 2 Price, 234, n. Gilb. Ev. 58.

put in. (1) Depositions are evidence, as an admission, against a party to the suit—or for the purpose of contradicting a witness—without proof of the bill and answer.

Depositions taken on interrogatories, under a commission from the Court of Chancery, of modern date, are not admissible without the production of the commission under the authority of which the depositions were taken: if the depositions are of a long standing, so that the commission may be presumed to have been lost, they are evidence by themselves: in either case, whether the depositions are of a recent or ancient date, there is no occasion to produce the bill and answer. (2)

On interrogatories.

Where the Court of Chancery, on directing a trial at law, makes an order, that the depositions of a witness shall be read, the proof of the bill and answer will be dispensed with. This order is not made for the purpose of making that admissible in evidence, which is not strictly admissible in Courts of Common Law; (3) and the depositions cannot be admitted, even under the order, unless it be satisfactorily proved, at the time of the trial, that the witnesses are unable to attend in person. If depositions were offered in evidence without such an order, the whole record, bill, answer, &c. must be regularly proved; but when there is an order for reading depositions, the Court of Law will read them, without going through the regular and strict course which is generally necessary for the purpose of making them evidence. (4)

Order to read.

It seems that an examined copy of a deposition in Chancery is admissible in evidence, at least in civil cases; (5) and that the same rule would hold in regard to an examined copy of an affidavit taken in Chancery. (6)

Affidavit.

(1) *Cazenove and Another v. Vaughan*, 1 Maule & Selw. 4; B. N. P. 240.

(2) *Baylie v. Wylie*, 6 Esp. 85. See *Rowe v. Brenton*, 8 B. & C. 766.

(3) 15 Ves. 176.

(4) *Palmer v. Lord Aylesbury*, 15 Ves. 176. *Corbett v. Corbett*,

1 Ves. & Beam. 340.

(5) *Highfield v. Peake*, M. & M. 110. The trial was upon an issue out of Chancery, and the deposition was used to contradict a witness.

(6) As to the proof of affidavits in Chancery, by examined or office copies, *vide supra*, *Office Copies*.

Depositions
before magis-
trates.

With regard to the proof of depositions and examinations in criminal cases, they are usually proved by the magistrate who took them, or by the clerk who wrote them. (1) But it seems that the examination of a prisoner taken before a magistrate, and signed with the prisoner's name, might be given in evidence, on the prisoner's handwriting being proved by any person. It has been, however, said, that if the prisoner does not sign his name, or if he only puts his mark to the examination, it must be proved by the magistrate or his clerk. For, if the prisoner signs his name, this implies that he can read, and that he has read the examination, and adopted it. But if he has not signed it, or has only put his mark, there are no grounds to infer that he can read, or that he knows the contents; and no person can, in general, swear that the examination has been correctly read over to him, except the person who read it. (2) Where the examination of a prisoner purported to be taken upon oath, evidence upon the trial of the prisoner, to shew that, in fact, he was not sworn, was rejected. (3) Evidence is admissible to

Some doubt appears to exist as to the points whether the originals should be produced; and, on the other hand, whether office copies, though not in the same cause, might be received, *Rees v. Bowen*, M'Cl. & Y. 383. *Rex v. James*, 1 Show. 397. *Casburn v. Reid*, 2 B. Moore, 60. *Crook v. Dowling*, 3 Doug. 75; B. N. P. 14. Where a distinction is taken between proving an affidavit made by a party and by a stranger. An affidavit, purporting to be sworn before a public commissioner acting as such, is evidence without proof of the commission, *Rex v. Howard*, Mo. & R. 187. An affidavit filed in Court on a motion, may be read in evidence at the sittings, without proof of it's being sworn, *Cameron v. Lightfoot*, 2 W. Bl. 1190. It seems to have been thought, that, upon indictments for perjury, the original affidavit should be produced, per Lord Mansfield, Ch. J., in *Crook v. Dowling*, 3 Doug. 77. *Vide supra*, *Proof of Answers in Chancery*. That user of an affidavit by the party is sufficient proof

of it's being sworn in civil, and, perhaps, in criminal cases, B. N. P. 238. A cognovit may be proved by an examined copy, *Scott v. Lewis*, 7 C. & P. 349. As to recognizances becoming records, per *Bailey, J.*, 4 B. & C. 409.

(1) 2 Hale, 52, 284.

(2) *Rex v. Chappell*, 1 Mo. & R. 396. The evidence was rejected; the examination had the prisoner's mark; the proof tendered was by a bystander. See the note of the reporters, *ib.* in which two MSS. cases, *Rex v. Richards*, and *Rex v. Hope*, are cited. See *ib.* as to the necessity that the examination should be proved by a person present when it was taken, and, that, where it must be proved to have been correctly read over, the magistrate or his clerk should be called for the purpose; when there were interlineations, Lord Lyndhurst said, that he thought the clerk ought to be called, *Brogan's case*, *Roscoe's Cr. Ev.* 49; and see *Hobson's case*, *Lewin*, 66; *Priestley's case*, *Lewin*, 74.

(3) *Rex v. Smith*, 1 Stark. 242,

add to an examination before a magistrate, though it has been taken in writing. (1)

A copy of depositions sworn at a Judge's chambers, and delivered out by his clerk, and attested by his signature, is admissible evidence, without proof of it's having been examined with the original. (2)

Depositions at chambers.

When a writ is only an inducement to the action, the fact of taking out the writ may be proved by producing it, because, before the writ is returned, it is not a record. But where the writ has been returned, and is itself the gist of the action, there ought to be a copy from the record, as the best proof of which the nature of the case is capable. (3)

Writs.

If it be necessary to prove, that a writ issued in a particular cause, it will not be sufficient to prove the *præcipe* by the filazer's book, and, after proof of notice to produce the original, to give in evidence a copy of the writ; but a proper search must be proved to have been made at the Treasury for the original writ, before secondary evidence can be given. (4) An examined

Elegit.

from a presumption in favor of the correctness of the magistrate's report. Perhaps, if the magistrate had been called to disprove his own statement, the question might have varied.

(1) *Rex v. Harris*, Mo. Cr. Ca. 338. *Venafræ v. Johnson*, 1 M. & Ro. 316.

(2) *Duncan v. Scott*, 1 Camp. 100.

(3) B. N. P. 234. As to producing the original writ, in order to prove allowance of a writ of error, *Cleghorn v. Desanges*, 3 B. Moore, 83; *Gow*, 66. As to the effect of writs, indorsements thereon, and returns, see *Brown v. Dean*, 2 Nev. & M. 317. Amount of arrest, *Fenton's case*, *Lofft*, 524. Delivery to sheriff, *Gyfford v. Woodgate*, 11 East, 297. Forbearance to sell on request, *Cator v. Stokes*, 1 M. & S. 599. Payment to judgment creditor, *Ledbetter v. Salt*, 4 Bing. 623. A second com-

mission of bankruptcy, *Tyler v. Leeds (Duke)*, 2 Stark. 218. Lordship of a manor, *Hill v. Sheriff of Middlesex*, 7 Taunt. 8. *Holt's N. P. C.* 217. *Bowden v. Waithman*, 5 B. Moore, 183. *Fermor v. Phillips*, 5 B. Moore, 184, n. *Martin v. Bell*, 1 Stark. 413. *Frances v. Neave*, 3 B. & B. 26. *Scott v. Marshall*, 2 Cr. & J. 238. *Tealby v. Gascoigne*, 2 Stark. 202. *Jones v. Wood*, 3 Camp. 229. *Drake v. Sykes*, 7 T. R. 113. *Morgan v. Brydges*, 2 Stark. 314. *Gibbins v. Phillips*, 7 B. & C. 535, n. To connect the Sheriff with his bailiff. *Rex v. Elkins*, 4 Burr. 2129. Return of rescue. That the time of the commencement of an action may be proved without the writ, see *Lester v. Jenkins*, 8 B. & C. 340.

(4) *Edmonstone v. Plaisted*, 4 Esp. N. P. C. 160. The Sheriff's book is not the proper evidence of the contents of a writ, nor will the

copy of the judgment-roll, containing the award of an *elegit* and return of the inquisition, is evidence, in an action for use and occupation, of the title of the plaintiff, who claims under the *elegit*, without proving a copy of the *elegit* and of the inquisition; (1) the judgment-roll is absolute proof of all the proceedings which it sets forth.

Rule of court. A rule of Court may be proved by an office copy, made out by the clerk of the rules, or by his deputy. (2) Where a Court prints and circulates copies of its rules, for the guidance of its officers, one of such copies is evidence of the rules on which the officers are to act, without shewing it had been examined with the original. (3)

SECTION II.

Proof of Writings not being Records or Judicial Proceedings.

Writings not
judicial.
Custody.

With respect to the proof of public writings not of a judicial character, it is essential that they should be produced from their proper place of custody. This rule is equally applicable to judicial writings, and to all documents, especially

Court take judicial notice of that book, *Russell v. Dickson*, 6 Bing. 442.

(1) *Ramshotbottom v. Buckhurst*, 2 Maule & Selw. 565.

(2) *Duncan v. Scott*, 1 Camp. 100. The rule, under the hand of the proper officer, is said to be itself an original, see *Selby v. Harris*, Lord Raym. 745; B. N. P. 229. Rules are said not to be records, *Rex v. Bingham*, 3 Y. & I. 101. They are commonly produced in the same cause and in the same Court. As where the office copy of a rule to pay money into Court is produced, *Israel v. Benjamin*, 3 Camp. 41. A rule making a Judge's order, under which an award had been made, a rule of Court has been held sufficient evidence of the order. *Still v. Hal-*

ford, 4 Camp. 19. The marginal note seems incorrect, in stating that an office copy of the rule was put in. As to the effect of a rule of Court in proving facts, see *Woodruffe v. Williams*, 6 Taunt. 19. *Compton v. Chandless*, 4 Esp. 18. In a recent case concerning the repair of Kelham bridge, a discussion arose concerning the admissibility, interpretation, and effect of various rules of the Court of King's Bench, in the reign of Charles II.

(3) *Dance v. Robson*, M. & M. 294. As to proof by a Judge's notes, see *Van Nyvel v. Hunter*, 3 Ad. & E. 244. *Smith v. Smith*, 3 Dowl. P. C. 733. *Ex parte Learmouth*, 6 Madd. 113. *Doncaster v. Day*, 3 Taunt. 262.

such as are ancient. The questions upon the subject have usually occurred in cases where the documents were not of a judicial character, the proper place of custody being in such cases more liable to be disputed. It will be convenient to consider, in this place, the general subject relative to the custody of documents.

Old grants to abbeys have been rejected as evidence of private right, because the possession of them did not appear to be connected with any persons who had an interest in the estate. (1) A grant to an abbey, contained in a manuscript entitled *Secretum Abbatis* in the Bodleian library at Oxford, was rejected, as not coming from the proper custody; (2) and on the authority of this case, Mr. Justice Lawrence held, that an old grant to a priory, brought from the Cottonian manuscripts in the British Museum, could not be received, as it was not shown, that the possession of the grant was connected with any person who had an interest in the estate. (3)

Custody of old documents.

In the case of *Bullen v. Michel*, (4) one of the questions, on the admissibility of a chartulary, related to the custody from which that old document was produced. It appeared that the chartulary was brought from the muniment room of the Marquis of Bath, who, although not the owner of the particular farm, nor of any property in the parish of S., was the owner of other estates formerly belonging to the abbey, and concerning which estates entries were to be found in the same document; and the character of the handwriting in the chartulary was proved to be of the reigns of the three first Edwards. "The question is," said the Lord Chief Baron Gibbs, in delivering the judgment of the Court, "whether this book appeared, from the facts attending it, to have belonged to the abbey of Glastonbury. We should recollect, that such a book, as this purports to be, usually contains a description of all the estates of the abbey, and all the transactions relating to them. When the abbey was dissolved,

(1) *Lygon v. Strutt*, 2 Anstr. 601.

(2) *Michell v. Rabbets*, 3 Taunt. 91.

(3) *Swinerton v. Marq. of Stafford*, 3 Taunt. 91.

(4) 2 Price, 413.

those estates went to the crown, and the crown afterwards granted them to different persons; the book, when the abbey was dissolved, would go to the officers of the crown, and when the crown portioned out and made over the possessions of the abbey to other persons, the book could go only to one of those grantees; and the only possible way of connecting it with the abbey is, by showing a connection between the possessor and the crown, and by raising a probability, that the crown may have handed over the book to the present possessor." Now, such a connection was shown in the present case; for it appeared, that the present owner of the book is also the owner of certain lands which formerly belonged to the abbey, and which, on the dissolution of the abbey, passed to the crown, and from the crown to the present possessor; and the probability is, that the book attended the lands in their passage from the crown. On this ground, therefore, the Court were of opinion, that the custody was so accounted for as to render the book admissible in evidence.

In the case of *Potts v. Durant*, (1) the Court of Exchequer determined, that some ancient writings, which had been offered in evidence, were inadmissible, because they had not been brought from the proper repository. One was a writing purporting to be an endowment of a vicarage; another was an ancient writing, purporting to be an *inspeximus* of the former, under the seal of the Bishop of Norwich, and containing a copy of the former, which is stated to have been at that time in the registry of the diocese. These writings were produced at the trial, by a person who had purchased them at a sale, as part of a private collection of manuscripts. Here the instruments came out of the custody of a private person, perfectly unconnected with the matters contained in them; and for this reason, were adjudged to be inadmissible. In the case of *Lygon v. Strutt*, (2) also, the Court of Exchequer held, that an ancient writing, purporting to enumerate the possessions of a monastery, which had been brought from the herald's office, was inadmissible.

(1) 3 Anstr. 789.

(2) 2 Anstr. 601.

The case of *Earl v. Lewis*, (1) is another instance on this subject. There it was proved, on the trial of an issue respecting the boundaries of two adjoining parishes, that the old papers offered in evidence on the part of the plaintiff (the rector of one of the parishes), had come into the possession of the son of the former rector, upon his father's death, and that the son delivered them over, as papers belonging to the parish, into the hands of the witness, who produced them in Court in the same state in which he had received them; and this was held to be sufficient evidence of the authenticity of the papers. So, in the case of *Jones v. Waller*, (2) on a bill for tithes, a book purporting to be the book of a collector of tithes, something more than seventy years old, being in the hands of the successor of that collector, was for that reason considered authentic.

In the case of *Manby v. Curtis*, (3) a paper, purporting to be a receipt fifty years old, was produced as matter of evidence, to shew that a man of the name of Curtas had, fifty years before, paid to a man of the name of Smith a certain sum in lieu of tithes, and, in support of the authenticity of this paper, it was proved to have been delivered to the witness by the defendant; but it did not appear where the defendant got the paper, nor did it appear whether Smith was dead, or even who he was; the Court of Exchequer therefore rejected the evidence, on the ground that the paper had not been authenticated. And in the case of *Randolph v. Gordon*, (4) where a book, purporting to be the book of a former rector, was produced by the defendant's attorney, who received it from the defendant, and the defendant was the grandson of the former rector; but it did not appear whether he had found the book among his grandfather's papers, or how it came into his possession; the Lord Chief Baron held, that the book was not admissible.

In the case of *Bertie v. Beaumont*, (5) the question was, whether a paper, which on the face of it contained evidence of

(1) 4 Esp. N. P. C. 1, before Heath, J.

(2) 3 Gwill. 847. The evidence is said to have been received without proof of the collector's handwriting,

see 2 Jac. & Walk. 468.

(3) 1 Price, 225; Mr. Baron Wood dissenting. 2 Jac. & Walk. 480.

(4) 5 Price, 312.

(5) 2 Price, 307.

money-payments in lieu of tithes enumerated in it, was admissible, to shew that Dr. Eyre, who was clearly at the time rector, and had been so for many years preceding, and had received customary payments (there being also negative evidence that no payment of tithes in kind had been ever made), had given such receipt, and thereby acknowledged such payments. This paper was produced by the defendant's solicitor, who stated, that he received it from the defendant for the purpose of preparing his defence. It was not given to the defendant, but to another person of the same name, and who of course occupied lands in the parish, for none but an occupier could have acquired such a receipt. The Lord Chief Baron Thompson said, "That person being of the same name with the present defendant, there is a reasonable inference, that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient." It was objected, also, that the handwriting of the paper had not been proved; "but," said the Chief Baron, "I do not think that any such proof was necessary to establish a document of this sort, at such a distance of time, any more than it would have been necessary to prove a deed of the same date."

The rule, respecting the proof of the custody in which documents have been kept, applies more particularly to ancient documents, whose authenticity depends in a great degree upon their custody, and which must be shewn to be connected with the party who produces them. In common cases, where the written instrument itself purports to belong to the party who produces it in evidence, no proof can be requisite as to the place in which it has been kept. On a question of settlement, where the respondents produced a certificate more than thirty years old, purporting to be granted to their parish by the appellant parish, the mere production of it was held to be sufficient, and the respondents were not obliged to show that the certificate had been kept in the parish chest; (1) and it would be sufficient, if the certificate were to be produced by a rated inhabitant of the parish. (2) So in an action for a false return to a manda-

(1) *Rex v. Ryton*, 5 T. R. 259.(2) *Rex v. Netherthong*, 2 Maule

mus, a corporator may produce the muniments of the corporation. (1)

In the case of the *Bishop of Meath v. The Marquis of Winchester*, (2) it was considered, that a particular document relating to the private interests of a bishop, though in some degree relating to the see, might more reasonably be expected to be preserved with his private papers and family documents, than in the public registry of the diocese; but that, under the circumstances of the case, considering the document as belonging to the see, it was not unreasonable that it should be found in the bishop's mansion house; for, upon the evidence, there was only one single ecclesiastical record preserved in the registry of the diocese of so early a date, whilst, on the other hand, the document was found in the same parcel with several papers relating to the see, and in the same room were several visitation books of the diocese and other papers relating to the see.

In delivering judgment in the last mentioned case, Chief Justice Tindal observes, with reference to the proper custody of documents, "It is not necessary that documents should be found in the best and most proper place of deposit. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they were actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various, and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses

& Selw. 337. This was before the late act of parliament, which made rated inhabitants competent witnesses on the trial of an appeal.

(1) 2 Maule & Selw. 338. The subject of the custody of documents

will be further adverted to, in treating of particular species of public writings, as terriers, registers and the like.

(2) 3 Bing. N. C. 203.

the mind with the conviction, that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate. Thus, in the case of *Lygon v. Strutt*, a manuscript found in the Herald's Office, enumerating the possessions of the dissolved monastery of Tutbury; in *Michell v. Rabbits*, a manuscript found in the Bodleian Library, Oxford; in *Swinerton v. Marquis of Stafford*, an old grant to a priory brought from the Cottonian MSS. in the British Museum; were held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, in the case of *Bullen v. Michell*, an old chartulary of the dissolved abbey lands of Glastonbury was held to be admissible, because found in the possession of the owner of part of the abbey lands, *though not of the principal proprietor*. This was not the proper custody, which, as Lord Redesdale observed, would have been the augmentation office, and, as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest proprietor; but it was, as the Court argued, a place of custody, where it might be reasonably expected to be found. So also, in the case of *Jones v. Waller*, the collector's book would have been as well authenticated, if produced from the custody of the executor of the incumbent or his successor, as from the hands of the successor of the collector. And the case of *Bertie v. Beaumont*, is to the same effect."

Examined
copy.

Public books.

In like manner, as in the case with regard to judicial documents, the rule appears to be generally applicable to public writings, namely, that wherever an original is admitted in evidence upon the footing of a public document, an examined copy will equally be admitted. (1) Thus, examined copies of the journals of the House of Lords or Commons, (2) or of the entries

(1) Holt, Ch. J. in *Lynch v. Comb*. 337.
Clark, 3 Salk. 153. *Rex v. Haines*,

(2) Lord Melville's case, 24 How.

in the council book in the Secretary of State's Office, (1) or of entries in the Bank books, (2) or in the books of the East India Company, (3) or in the books of assessments made by the commissioners of land-tax, (4) or in the books of commissioners of excise, (5) or in the poll books of an election of a mayor or member of parliament, (6) and other cases of the same kind, have been admitted in evidence without accounting for the non-production of the original books. (7)

In proving any matter by the *Gazette*, it is not necessary to shew that it was bought at the office of the printer of the *Gazette*, or to give other evidence whence it came. (8) A Court will not take judicial notice of the king's proclamations. (9)

Gazette.
Proclamations.

With respect to the proof of particular species of public writings not being records or judicial proceedings. Copies of Court rolls properly stamped and signed by the steward of the manor, are evidence of the contents of the rolls, to prove admissions and surrenders, as are also the original rolls. (10) Where

Court rolls.

683. *Rex v. Lord G. Gordon*, 2 Doug. 593. *Vide supra*, proof of reversal of a judgment in the House of Lords. See Vin. Ab. Evidence, p. 122.

(1) *Eyre v. Palgrave*, 2 Camp. 606, proof of a licence.

(2) *Marsh v. Colleet*, 2 Esp. 665. The testimony of the broker is insufficient to prove a transfer, *Bretton v. Cope, Peake*, 30. Doug. 572, n., 593, n. So also transfer books of the East India Company, Doug. 572.

(3) Doug. 503, n.

(4) *Rex v. King*, 2 T. R. 234.

(5) *Fuller v. Fetch, Carth.* 346.

(6) *Mead v. Robinson, Willes*, 424.

(7) See *Coombs v. Coether, M. & M.* 398, book kept in Chapter house. It seems that the books of the King's Bench and Fleet prisons are not provable by copies. See *Salte v. Thomas*, 3 B. & P. 190. As to the proof of Herald's books, see Vin. Ab. Ev. A. b. 39, p. 118. B. N. P.

248. Str. 162. In one case a copy of an agreement contained in one of the books of the Bodleian library was received, *Downes v. Moreman*, 2 Gwill. 659. *Man v. Cary*, 3 Salk. 155, a bank note filed at the bank. 2 Str. 954, books of the City of London. See a collection of cases as to the proof and effect of various public writings in Vin. Ab. Ev. A. b. 26, p. 97. A. b. 15, p. 88. It would seem that in several cases which are usually referred to this principle, the evidence by an examined copy has been received, not so much on the account of the nature of the document, as the impracticability of procuring the original.

(8) *Rex v. Forsyth, R. & R.* 274.

(9) *Van Omeson v. Dowick*, 2 Camp. 44.

(10) *Doe v. Hall*, 16 East, 208, which shews that the original entry is evidence, notwithstanding the statute. The doctrine, that in ejectment the original rolls must be produced, stated in 2 Watkins on Co-

a surrender of copyhold lands is made out of Court by a deed of surrender, although the act of 48 Geo. 3, c. 149, requires that, in such a case, the deed of surrender or memorandum thereof shall be stamped, and not the copy, as in other cases, the copy will, notwithstanding, be evidence of the surrender. (1) The steward's copy is received in evidence upon the same principle as the chirograph of a fine, or the enrolment of a deed. (2) Some evidence of the identity of the party admitted is requisite. (3) Where evidence from the manor rolls is adduced, not to prove a conveyance, but for other purposes, as to establish a custom, an examined copy appears to be the proper evidence.

Where a surrender of a copyhold was duly made and presented by the homage, but no entry of such presentment and surrender was made on the rolls, it was held, that the surrender and presentment might be proved by a draft of an entry produced from the rolls of the manor, with the parol testimony of the foreman of the homage jury who made the presentment. (4) Where a surrender was made in the year 1774, and there was no record of it on the rolls, the books of the manor containing a record of the admission, which noted the surrender, were received as evidence of it. (5)

pyholds, p. 38, n. 1, appears to be incorrect, see 4 B. & Ad. 617, and B. N. P. 247.

(1) *Doe d. Hawthorn v. Mee*, 4 B. & Ad. 617.

(2) Per Holroyd, J., in *Appleton v. Braybook*, 6 M. & S. 38. It would seem that the steward's signature should be proved. The authorities do not precisely determine whether it be necessary to prove the steward's handwriting; or whether the official copy delivered by the steward, is not such primary evidence as to make an examined copy, taken by another person, inferior evidence. See these points considered in *Coventry's Conv. Ev.* 156. *Snow v. Cutler*, 1 Keb. 567. *Lee v. Boothby*, *ibid.* 720. B. N. P. 247. *Doug.* 56. 2 Bac. Ab. 611. 5 Esp. 221. *Appleton v. Braybook*,

6 M. & S. 38. 12 Mod. 24. Comb. 138, 337. 1 J. & W. 617. Where the admittance is of thirty years' standing, *Ely v. Stewart*, 2 Atk. 44. *Somerset v. France*, *Fortesc.* 43. 1 Str. 654.

(3) *Doe d. Hanson v. Smith*, 1 Camp. 196.

(4) *Doe d. Priestley v. Callaway*, 6 B. & C. 484. Lord Holt ruled, that the rough draft of a steward was good evidence of an admittance, *Lord Raym.* 735.

(5) *Rex v. Thruscross*, 1 Ad. & E. 126. Various authorities shew that the rolls of a manor are not conclusive as records, but that the parties may prove a mistake in them, see the cases referred to by Lord Tenterden in *Doe v. Callaway*, 6 B. & C. 494.

The books of a corporation cannot be admitted in any case, ^{Corporation books.} unless shewn to have been regularly kept by the proper officer of the corporation. On an information in the nature of a *quo warranto*, the prosecutor produced in evidence a book written by the prosecutor's clerk, not an officer of the corporation, which appeared to be only minutes of corporate acts done some years before, and was not kept as a public book of the corporation; this evidence was rejected at the trial, and, on a motion afterwards for a new trial, the Court held that it had been properly rejected. "Corporation books," the Court said, "are generally allowed to be given in evidence, when they have been publicly kept as such, and when the entries have been made by the proper officer; not but that entries made by other persons may be good, if it is shewn that the town-clerk was sick or refused to attend." (1)

Corporation-books must come from the proper custody. In the case of ancient books, questions upon this point have occasionally arisen. Thus, it has been held, that books, purporting to be corporation-books, produced from a chest found in the house of a former town-clerk, after his death, and not from the corporation chest, could not be received. (2)

With regard to the question, what is properly a corporation-book, it appears that a loose paper duly stamped upon a file, containing an entry of a freeman's admission, has been, in one case, considered the proper and original act of the corporation, in preference to an unstamped entry of the admission more at large in a book of acts of the corporation. (3)

Examined copies of corporation-books are evidence to prove corporate acts; but this rule does not extend to papers belonging to a corporation and kept in their chests, the entries in which are not of a public nature. (4)

(1) *Rex v. Motherrell*, 1 Str. 12. Vin. Ab. Ev. A. b. 15, pl. 16. 17 Howell, 854.

(2) *Mercers of Shrewsbury v. Hart*, 1 C. & P. 114.

(3) *Rex v. Head, Peake* Ev. 92, (n).

(4) *Rex v. Gwyn*, 1 Str. 401. A letter fifty years old, shewing a person to be non-resident, *Brocas v. Mayor of London*, 1 Str. 307.

Parish registers.

Parish registers may be proved by examined copies, which need not be stamped. (1) If the register is produced for the purpose of identifying the parties to a marriage, their handwriting need not be proved by an attesting witness to the register. (2) It seems that the returns made annually of the transcripts of parish registers, under the 70th canon, to the registry of the diocese, are not receivable in evidence instead of the original register or an examined copy of it, except as secondary evidence, in which case, examined copies of the returns would be receivable; but that, if the returns be made under the statute 52 Geo. 3, c. 146, examined copies of them would be evidence, without proof of the loss of the original register. (3)

If the parson of a parish be applied to for an extract of a parish register of a particular date, and he produces to the applicant a book as the original register, it will be presumed to be so, until the contrary is shewn. But if he says that there is no register of the particular year, that is not sufficient proof of the loss of the register, so as to let in secondary evidence, without calling the parson as a witness. (4)

Peerage cases.

In questions of peerage, the original register, or, if that cannot be produced, the transcript deposited with the bishop is generally required. (5) In the *Gardiner Peerage* case, however,

Madras register.

(1) B. N. P. 247; see 52 Geo. 3, c. 146, s. 17. It seems that *vide voce* proof of the register would be equivalent to an examined copy; this, however, has been doubted, per Buller, J., 2 Evans's Pothier, 139.

(2) *Best v. Barlow*, Doug. 172, where Lord Mansfield says, that "parish registers are in the nature of records, and need not be produced, or proved by subscribing witnesses." An examined copy of the register of a marriage in the Swedish Ambassador's chapel, at Paris, is not evidence, *Leader v. Barry*, 1 Esp. 353; and *vide supra*, *Legal Registers*. On the proof of the identity of the parties, *vide supra*, *Effect of Registers*. That a marriage may be proved without evidence of registration,

licence, or banns, *Allison's case*, R. & R. Cr. Ca. 109. The jury may look at other entries in the register, in order to see whether those produced are in their right places, but for no other purpose, *Walker v. Beauchamp*, 6 C. & P. 559.

(3) *Walker v. Beauchamp* (Coun-
tess), 6 C. & P. 552. The learned Judge entertained great doubt as to the points decided in this case. The comparison of the register in the parish chest, with the registry in the diocese, has often led to the detection of forgeries and erasures.

(4) *Walker v. Beauchamp*, 6 C. & P. 552.

(5) *Minutes of Evidence*, *Marchmont's case*, p. 5; *Killmorey's case*, p. 10.

where, to prove the marriage of Lord Gardiner at Madras, a book brought from the secretary's office in the East India House, and containing a list of marriages and burials at Madras, purporting to be authenticated by the signatures of the officiating clergymen, was produced, it appeared that this book consisted of several sheets, copied from the original register in India, and transmitted from time to time to the East India House. Upon it's being shewn, that the list, containing the entry of Lord Gardiner's marriage, was in fact transmitted from India, (which was principally proved by the accompanying dispatch from the secretary of government,) and that the clergyman, whose name was affixed thereto, did, at the time when the alleged marriage was solemnized, officiate at Madras, the marriage was considered as proved. (1)

By stat. 6 Geo. 4, c. 110, s. 43, it is enacted, " That the collector and comptroller of his Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit, for his, her, or their inspection and examination, any oath or affidavit taken or sworn by any owner or owners, proprietor or proprietors, (of the vessels mentioned in the act) and also any register or entry in any book or books of registry required by that act to be made or kept, relative to any ship or vessel; and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies, or an extract or extracts thereof respectively; and that the copy or copies of any such oath or affidavit, registry or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respec-

Ship's registers.

(1) Minutes of Evidence in the Gardiner case, p. 15. On the proof of marriages in a British colony, see *Lautour v. Teesdale*, 8 Taunt. 833. *Rex v. Brampton*, 10 East,

282. *Ruding v. Smith*, 2 Hagg. 371. *Rex v. Reebly*, 3 Chet. Burn. 726. *Smith v. Maxwell*, R. & M. 80. *Jacob's case*, 1 Mo. Cr. Ca. 140.

tively, in all cases as fully, and to all intents and purposes, as such original or originals, if produced by any collector or collectors, comptroller or comptrollers or other person or persons acting for them, could or might legally be admitted or received in evidence."

Terriers.

Custody of.

Terriers are, by the Ecclesiastical Canons, required to be returned into the registry of the bishop. This return, which is generally signed by the minister, is denominated a terrier, and derives its authority from being found either in the bishop's register office, (1) or the registry of the archdeacon of the diocese, (2) or the parish chest. (3) Unless it comes from one of these repositories, it cannot, in general, be admitted in evidence. A paper, therefore, purporting to be a terrier, found in the charter chest of a college which had property in the parish, was thought to be inadmissible to disprove a modus. (4) However, under particular circumstances, this rule respecting the custody of the terriers has been relaxed, and a terrier has been admitted, though not brought from one of the regular repositories, when the custody in another place has been satisfactorily explained. One that was found in the registry of the Dean and Chapter of Litchfield has been admitted in evidence against a prebendary. (5) This evidence was rejected at the trial; but a new trial was afterwards granted by the Court of King's Bench, on the ground, that the evidence ought to have been received, as there appeared to be a proper connection between the terriers and the place where it was found; and a strong corroborating circumstance was, that the terrier was found annexed to an old lease of the prebend, of nearly the same date. (6) But when the custody is merely private and

Private custody.

(1) *Atkins v. Hatton*, 4 Gwill. 1406; 2 Anstr. 386, S. C.; 4 Gwill. 1593. The bishop's registry is the proper place of custody for the accounts and other papers of sequestrators, *Pulley v. Hilton*, 12 Pr. 625.

(2) *Potts v. Durant*, 4 Gwill. 1450, 1454; 3 Anstr. 789, S. C. See *Drake v. Smyth*, *ante*, p. 409 (1).

(3) *Armstrong v. Hewit*, 4 Price, 218.

(4) 4 Gwill. 1406.

(5) *Miller v. Foster*, 4 Gwill. 1406, n., and see *Bullen v. Michel*, stated in ch. 8, s. 2, *infra*.

(6) 4 Gwill. 1453, and see *Tucker v. Wilkins*, 4 Simons, 241, where a terrier from the custody of an individual, who claimed tithes of a district in the parish, was admitted; and also a copy of an endowment, under peculiar circumstances. A terrier may sometimes

unconnected with the subject-matter, the Courts have never gone the length of admitting such papers in evidence. (1)

Testaments are proved in the Ecclesiastical Court, either in common form, or in form of law. The first mode of proof is, where the executor presents the will, without citing the parties interested, and deposes that it is the true and last will of the testator, upon which the Judge allows the will. The proof in form of law is, when the will is exhibited before the Judge in presence of the parties interested, and, after a full examination, finally allowed. (2) If the will be proved in common form, it may be disputed at any time within thirty years; but if it be proved in the more formal mode, and there be no proceedings within the time limited for appeals, the will cannot afterwards be disputed. (2) After proof of the will, the original is deposited in the registry of the ordinary or metropolitan, and a copy in parchment is made out under his seal, and delivered to the executor, together with a certificate of it's having been proved before him, which copy and certificate are the probate. A Court of Common Law will not take notice of a will as a title to personal property, till it is proved in the Ecclesiastical Court; (3) and though the original will, together with the probate, is produced by the officer of the Ecclesiastical Court, the will cannot be read in evidence, unless it bears the seal of the Court, or some other mark of authentication. (4)

It is not the practice in the Ecclesiastical Courts to grant a second probate, if the first should be lost, but only to grant an exemplification from the record of the Court, and this exemplification will be evidence of the proof of the will. (5) And an examined copy of a lost probate is evidence of the person there

Testaments.

Exemplification.

Copy of probate.

operate by way of admission, though not found in the usual repositories, *Maddison v. Nuttal*, 6 Bing. 226.

(1) *Potts v. Durant*, 4 Gwill. 1450, *supra*. See also *Atkins v. Drake*, M'C. & Y. 213.

(2) 3 Bac. Ab. 40, tit. Executor.
(3) *Stone v. Forsyth*, 2 Doug. 707. The title of several executors

may be proved by probate granted to one, *Walters v. Pfiel*, M. & M. 362.

(4) *Rex v. Barnes*, 1 Starkie, N. P. C. 243. *Pinney v. Pinney*, 8 B. & C. 335. The act of the Court may be endorsed on the will, *Doe v. Barnard*, Cowp. 295.

(5) *Shepherd v. Shorthouse*, 1 Str. 412. Bull. N. P. 246.

named being executor, as the probate is an original, taken by authority, and of a public nature; (1) but a copy of the will would not be evidence of that fact. (2) The seal of the Ecclesiastical Court, on the probate, need not be proved. (3)

Ledger-book.

The probate of a will, devising real property, is not evidence of the contents, in an action of ejectment, even to prove a relationship; for where the original is in being, the copy is not admissible; and, besides, the seal of the Court does not prove it a true copy, unless the suit relate only to personal property. (4) But the ledger-book, says Mr. Justice Buller, is evidence in such a case, because this is not considered merely as a copy, but is a roll of the Court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove relationship, the rolls of the Spiritual Court, which has authority to enrol wills, are sufficient proof of such testament. (5) It has been, on some occasions, held, that a copy of the ledger-book is not evidence; yet, since the original would be read as a roll of the Court without further attestation, it seems fit, says Mr. Justice Buller, that the copy should also be read. The contrary practice, he adds, has been founded upon the mistaken supposition that the ledger-book is read as a copy, when in fact it is read as a roll of the Court. (5)

(1) *Hoe v. Nelthorp*, 3 Salk. 154; 1 Lord Raym. 154, S. C. Holt, Ch. J., in *Rex v. Haynes*, Skin. 584. The probate-act book has been considered evidence of a will, without accounting for the non-production of the probate. *Cox v. Allingham*, Jacob, 514, and see *Gorton v. Dyson*, 1 B. & B. 219. Original will under seal, produced as secondary evidence. In *Rex v. Hains*, Comb. 337, Holt, Ch. J. said, that the copy of a probate was not evidence, because it was a copy of a copy.

(2) Bull. N. P. 246.

(3) *Kempton v. Cross*, Rep. temp. Hard. 108.

(4) Bull. N. P. 246. It is not evidence that copyholds pass by the will, *Jervoise v. D. of Northumberland*, 1 J. & W. 570; and see *Hume v. Rundell*, 6 Madd.

331, as to proof of the testamentary character of an instrument. That the probate is not admissible as secondary evidence of a will of lands, *Doe v. Calvert*, 2 Camp. 389. Probate not proof of pedigree, *Doe v. Ormerod*, 1 M. & Ro. 466.

(5) Bull. N. P. 246. The ledger-book may be secondary evidence to prove a rent-charge, *ib.* The distinction between the effect of the ledger-book and a probate, as to proving pedigree, seems to partake of subtlety. In neither case is the will to be considered as proved for the purposes of the real estate; but the probate copy may be subject to greater danger from incorrectness, or alterations. As to the copy of a will remaining in Chancery, by order of the Court, see *Keb. 40, 117*; *Gilb. Ev. 276*.

To prove that the probate of a will has been revoked, an entry of the revocation in a book of the Prerogative Court, in which all causes were entered by the registrar, and which was kept as the only record of such proceedings, and of the decree of the Court, has been admitted to be good evidence. (1)

Revocation of probate.

Administration is generally granted by writing under seal. It may also be granted by entry in the registry without letters under seal. (2) The Ecclesiastical Court never grants an exemplification of letters of administration, but only a certificate that administration was granted; therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. (3) And the original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom administration of the intestate's effects is granted, without producing the letters of administration themselves (notwithstanding subsequent letters of administration granted to another), if the first are not recalled: for the original book was the authority for the proper officer, to make out letters of administration, and the letters of administration were only the copy of the original minutes of the Court, drawn up in a more formal manner. (4) An examined copy of the act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration. (5)

Letters of administration.

Certificate.

Book of acts.

The seal of the Corporation of London has been held to prove itself; (6) but the seal of any other Corporation must be proved to be genuine by a person acquainted with the seal. (7)

Seals.

(1) *Ramsbottom's case*, 1 Leach, Cr. C. 30, n. (c).

(2) *Vin. Ab. Executor*, D. p. 70.

(3) *Kempton, dem. Boyfield v. Cross*, Rep. temp. Hard. 108. Bull. N. P. 246.

(4) *Elden v. Keddell*, 8 East, 187. *Garrett v. Lister*, 1 Lev. 25; Bull. N. P. 246; 2 Maule & Selw. 567.

(5) *Davis v. Williams*, 13 East, 232. *Ray v. Clark*, *ib.* 238, n. a.

(6) *Doe v. Mason*, 1 Esp. 53. *Olive v. Gwyn*, 2 Sid. 145.

(7) *Morres v. Thornton*, 8 T. R. 307. The genuineness of the seal of the Apothecaries' Company must be proved. *Chadwick v. Bunning*, R. & M. 306. As to the invalidity of the instrument, where the seal is affixed by a stranger, *Anon.* 12 Mod. 423. See *Rex v. Haughley*, 4 B. & Ad. 653.

In *Rex v. Bathwick*, (2) it was intimated by Lord Tenterden, that the seals of Courts and Corporations, being of permanent nature, and therefore capable of being proved at any distance of time from the date of the instrument to which they are affixed, were not within the principle of the rule which dispenses with the proof of private seals, affixed to instruments thirty years old.

Post-marks.

The genuineness of the Post-office mark may be proved by any post-master, or, as it seems, by any one who is in the habit of receiving letters by the post. (1)

CHAPTER IV.

OF THE PROOF OF PRIVATE WRITINGS.

IN treating of this part of written evidence, it will not be attempted to describe all the various kinds and requisites of private writings, which would far exceed the limits of the present Work. The inquiry will be confined chiefly to the principles, which are applicable generally to the proof of private writings. These principles relate to the proof of the execution of writings by an attesting witness, to the secondary evidence of writings, and to the proof of handwriting.

Proof by attesting witness.

First, concerning the execution of writings by an attesting witness.

(1) *Abbey v. Lill*, 5 Bing. 299. The latter point was not actually decided. In *Fletcher v. Braddyl*, Stark. Ev. App. the post-master of another office was called, this was thought not to carry the proof further than in *Abbey v. Lill*. In *Rex v. Watson*, 1 Camp. 214, Lord Ellenborough refused to allow a Middlesex post-mark unauthenticated to be proof of publication in

Middlesex of a libel. The proof of coin being counterfeit is usually proved by a person from the Mint; but this does not appear to be essential.

(2) 2 B. & Ad. 648. It was determined that the seal of a Bishop to a certificate of ordination, was not to be considered his corporate seal.

A general rule with respect to the proof of private writings is, that where an instrument is attested by a subscribing witness, such witness ought to be produced at the trial to prove it. (1) The rule probably originated in the instance of deeds executed between parties, on the ground that the parties must be considered as having mutually agreed to rest the proof of the instrument upon such testimony, as being that of a person having peculiar knowledge of all the circumstances attending the execution, and which possibly may not be so well known to the parties themselves, or at least to all of them. (2) The Legislature has required, that various instruments should be attested and proved by subscribing witnesses in cases where it has been deemed expedient, on public grounds, to facilitate inquiry into the circumstances under which they have been executed, and the like caution has been adopted by individuals conferring upon other persons a power of disposition over their property.

Principle of rule.

Though the reason is not so obvious, the rule is now understood to be applicable to every case, where a written instrument is attested by a subscribing witness. Thus, attested notices to quit, (3) attested warrants to distrain, (4) attested bills of exchange or promissory notes, are to be proved by the subscribing witness. And, in the case of a notice to quit, the circumstance that the party upon whom the notice was served read the notice, and made no objection to it, cannot vary the rule. (5)

Extent of rule.

This rule is so strictly observed, that an acknowledgment of

(1) This has been the rule from the earliest times. The ancient process of bringing the subscribing witnesses into Court, is stated in *Fortescue de Laud. Leg. Ang. c. 32*. See also *Jenk. Cent. p. 47, ca. 89*. In *Rex v. Harringworth*, 4 M. & S. 352, where the rule was held to apply to settlement cases, Lord Ellenborough said, that the rule was as "fixed, formal, and universal, as any that can be stated in a Court of Justice."

(2) Lord Ellenborough, in *Rex v. Harringworth*, 4 M. & S. 354, says,

that it does not follow, that because the subscribing witnesses are the plighted witnesses to prove the execution, they must be the best witnesses, for others may know more of the transaction than they; but inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential.

(3) *Doe d. Sykes v. Durnford*, 2 M. & S. 62.

(4) *Higgs v. Dixon*, 2 Stark. 180.

(5) *Doe v. Durnford*, 2 M. & S. 62.

the obligor himself, admitting that he executed a bond, (1) and even an admission by the defendant in answer to a bill filed against him for a discovery, (2) will not dispense with the testimony of the subscribing witness; for though the party may acknowledge the bond, yet he may not know every circumstance attending the execution; "a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." (3) The rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself who made it, (4) or against a third person; (5) or whether the deed is an existing instrument or cancelled; (6) or whether it is the foundation of the action, or comes in question collaterally as part of the evidence in the cause. (7)

Exceptions.

There are several exceptions to the rule, which requires the proof of an instrument by the subscribing witnesses. They are of two kinds, namely, such as relate to circumstances connected with the instrument, and which have the effect of dispensing with it's being proved in any manner, and those, which relate personally to particular witnesses, and which have the effect of dispensing with their being produced, on proof of their handwriting.

Date of instrument.

Thirty years.

One of the exceptions relates to circumstances connected with the instrument. It is a rule, that if an instrument is thirty years' old, it may be admitted in evidence without any proof of it's execution; such instrument is said to prove

(1) *Abbot v. Plumbe*, 1 Doug. 216, cited by Lawrence, J., 7 T. R. 267, and 2 East, 187. Lord Ellenborough, in *Rex v. Harringworth*, 4 M. & S. 353, observed, that if ever there was a case in which the rule might reasonably have been relaxed, it was that of *Abbot v. Plumbe*.

(2) *Call v. Dunning*, 4 East, 53. See *Bowle* and another, assignees of *Jones v. Langworthy*, 5 T. R. 366; and as to the case of *Rex v. Middlesoy*, on the authority of which that case was determined,

vide supra, p. 448.

(3) *Le Blanc, J.*, 4 East, 53.

(4) 4 East, 53.

(5) 1 Doug. 216.

(6) *Breton v. Cope*, Peake, N. P. C. 30.

(7) *Manners, q. t. v. Postan*, 4 Esp. N. P. C. 239. The rule obviously does not apply to express agreements made with reference to a trial, to waive the proof by a subscribing witness; or where the execution is admitted by payment into Court.

itself. (1) This rule appears to be founded on general experience of the inconvenience and inutility of searches after attesting witnesses to ancient deeds, and the expediency of fixing some definite limit to searches of this nature. The danger arising from such a relaxation of general principles is, in some measure, diminished by the operation of the rule, which requires documents to be produced from their proper place of custody; and, in many instances, the circumstances of the instrument having been acted upon, and of the enjoyment of property being consistent with and referable to it, or otherwise, affords a criterion of its genuineness. (2)

Principle of exception.

Lord Tenterden, in *Doe d. Oldham v. Walley*, (3) with regard to the argument, that where the existence of an attesting witness is proved, he ought to be called, observes, that "although the principle, on which deeds after that period are received in evidence without proof of their execution, is, that the witnesses may be presumed to have died, yet that allowing this presumption to be rebutted, would only be a trap for a nonsuit. The party producing the will might know nothing of the existence of the witness till the time of trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant."

In a case, where the seal of the Bank of England was affixed by a paper wafered to an indenture, on which paper was written "sealed by order of the Court of Directors of the Governor and Company of the Bank of England, 12th of December, 1833. A. B. Secretary," it was held, that it did not appear that A. B. was an attesting

Attesting witness, who.

(1) *Doe d. Spilsbury v. Burdett*, 4 A. & E. 19; 2 T. R. 471; B. N. P. 255.

(2) See Vin. Ab. Evidence, A. b. 5, cited 7 East, 291; B. N. P. 255. *Fry v. Wood*, Selw. N. P. 517, n. *Forbes v. Wale*, 1 Bl. 532, cited by Lord Kenyon, 1 Esp. 278; 4 B. & A. 376. As to the custody of old documents, *vide supra*.

(3) 8 B. & C. 24. The reasoning of Lord Tenterden would seem to require a further inference, namely, that such artifices were very likely to be resorted to with success, in the instance of ancient writings, and that they could not be excluded without drawing some definite line.

witness. The statement was treated as a memorandum, that the party signing was the person deputed by the corporation to affix it's seal. (1)

Extent of exception.

This exception applies generally to deeds concerning lands, to bonds, (2) receipts, (3) letters, (4) and all other ancient writings; the execution, or writing of which need not be proved, provided they have been so acted upon, or brought from such a place, as to afford "a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty." (5)

Will.

The rule of computing the thirty years from the date of a deed, is equally applicable to a will. (6) Some doubt was formerly entertained upon this point, on the ground that deeds take effect from their execution, but wills from the death of the testator. (7)

Seal of corporation.

In the case of *Rex v. The Inhabitants of Bathwick*, (8) it appears to have been doubted, whether the seal of a Court or

(1) *Doe d. Bank of England v. Chambers*, 4 A. & E. 412. A doubt was raised in the argument of counsel, whether, when there is an attesting witness to the affixing the seal of a corporation, he need be called, as the execution of a deed by a corporation is proved by shewing that the seal is the seal of the corporation, not by giving evidence of it's being affixed by them. The seal, however, requires proof; and it may possibly be considered, as matter of agreement, that a plighted witness should be called to prove the seal.

(2) *Governor of Chelsea Water-works v. Cowper*, 1 Esp. N. P. C. 275.

(3) *D. & Ch. of Ely v. Stewart*, 2 Atk. 44. *Fry v. Wood*, 1 Selw. N. P. 492. *Manby v. Curtis*, 1 Price, 232. *Bertie v. Beaumont*, 2 Price, 308. *Bullen v. Michel*, 2 Price, 399. 4 Dow. 297. *Sir W. W. Wynne v. Tyrwhitt*, 4 Barn. &

Ald. 376.

(4) In *Beer v. Ward*, on the trial of an issue as to the legitimacy of a particular person, a very old letter, purporting to bear the signature of the head of the family, and brought from among the title-deeds kept at the family-seat, was admitted as genuine, without proof of the handwriting, by Dallas, Ch. J., in C. P. sutt. after Mich. T. 1821, S. P. by Lord Tenterden, K. B. sutt. after Trin. T. 1823, on second trial.

(5) Vin. Ab. tit. Evidence (A. b. 5), cited 7 East, 291. Bull. N. P. 255. *Forbes v. Wale*, 1 Black. 532, cited by Lord Kenyon, 1 Esp. N. P. C. 278. 4 Barn. & Ald. 376. As to the custody of old documents, *vide supra*.

(6) *Doe d. Oldham v. Wolley*, 8 B. & C. 22.

(7) See *M'Kenire v. Fraser*, 9 Ves. 5.

(8) 2 B. & Ad. 648.

corporation was within the rule as to thirty years. Lord Tenterden said, it might be argued, that it was not within the principle of the rule, because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of Courts and Corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed.

If there is any blemish in the deed by rasure or interlineation, it has been said that the deed ought to be proved, though above thirty years old, (1) and the blemish satisfactorily explained. In such a case, the jury would have to try, whether the rasure or interlineation was before or after the delivery of the deed; for, if the rasure was before that time, the deed is still valid and binding; it is only after the delivery, that a rasure or interlineation can effect a deed, and even then they are in some cases immaterial. Now, to ascertain the time of delivery, the first and best evidence to be resorted to is the testimony of a subscribing witness, if any can be produced; or, if there is no subscribing witness, other persons may be called, who were present when the deed was delivered; or if no person was present, the time of delivery will be reckoned from the date of the deed. And the fact, of the rasure having been after the delivery, may be proved either by a subscribing witness, or by any other person who saw the rasure made.

Rasure.
Interlineation.

The rule, that deeds of thirty years' standing prove themselves, is so well established, that even if a subscribing witness were alive, and in a state to be produced, it has been thought unnecessary to call him for proving the execution. Lord Kenyon is reported to have said, (2) that he remembered a case before Mr. Justice Yates, in which, a deed of that age being produced in evidence, it appeared, that the subscribing witness was then actually in Court; but the Judge declared, he would

Subscribing
witness alive.

(1) Gilb. Ev. 89. Bull. N. P. 255. P. C. 665. And see Doe d. Spilbury v. Burdett, 4 A. & E. 1.
(2) March v. Collnett, 2 Esp. N.

not break in upon a rule of evidence so well established, by requiring the subscribing witness to be called, and admitted the deed without further proof. In the case of *Rees v. Mansell*, (1) indeed, Mr. Baron Perrot held, that, although a deed may be read in evidence on account of its antiquity, yet, if on the other side it is shown, that one of the witnesses is alive, he must be produced, or the deed must be rejected; and he cited a case, where a deed was produced in the King's Bench, and it appeared, that Sir Joseph Jekyll was the subscribing witness, upon which the Court said, they knew he was alive, and that if he did not come to prove it, the plaintiff must be nonsuited. It was then mentioned to have been ruled by Mr. Justice Yates, that, for the sake of practice, the witness should not be allowed to prove an old deed, even if he attended for that purpose; but Mr. B. Perrot retained his opinion; "An old deed," he said, "is admitted only on a presumption that the witnesses are dead, but when the contrary is made to appear, they must be called." If the rule is founded on the mere presumption of the attesting witness's death, then it seems to follow, that where this presumption is contradicted by the fact of his being still alive, the execution of the deed ought to be regularly proved, as in ordinary cases. But if Courts of Law have adopted the rule, not on the single presumption of a fact (which would be for the consideration of the jury rather than of the Court,) but as a general maxim of law, there appears to be no inconsistency in acting generally upon this principle, though in the particular case the subscribing witness may be proved to be alive, at the same time leaving it to the opposite side to dispute the regularity of the execution, by calling him or any other witness.

Possession of
adverse party.

Although it is now clearly established, that the fact of a written instrument coming out of the possession of the adverse party will not dispense with the necessity of proving its execution, (2) yet an exception of great practical importance to the

(1) 1 Selw. N. P. 492.

(2) *Doe d. Wilkins v. Marquis of Cleveland*, 9 B. & C. 869. *Knight v. Martin*, Gow, 26. *Gordon v. Secretan*, 8 East, 548. *Overruling Rex v. Middlezoy*, 2 T. R. 41. It

was said by the Chief Justice, in *Pearce v. Hooper*, 3 Taunt. 62, supposing that an heir at law is in possession of a will, and the devise brings an ejectment, and calls on the heir to produce the will; there,

rule which requires the proof of writings by an attesting witness, has been established, namely, that where a party who claims a beneficial interest under a deed, produces it under a notice, he is not entitled to insist on the execution being proved, either by the attesting witness, or in any other manner; by calling for the production of the deed, he is considered as affirming it's due execution. (1)

Thus, in the case of *Pearce v. Hooper*, (2) in an action of trespass, where the question was, whether the place in which the trespass was alleged, belonged to the plaintiff, as part of a certain estate; the defendants gave notice to the plaintiff to produce a deed of conveyance, in which the estate had been conveyed to the plaintiff by a description, limited to a number of acres, which, it was said, would necessarily exclude the place in question. The plaintiff produced the conveyance; and it was held that the defendants were not obliged to call the attesting witness, on the ground that the plaintiff had no interest in the fee-simple of the estate, if the deed in question did not convey it. In the case of *Orr v. Morris*, (3) which was an action for the use and occupation of premises, brought against the assignees of a bankrupt, it was held, that the deed of assignment of the bankrupt's effects, produced by the defendants, at the trial, under a notice from the plaintiff, was admissible in evidence, without proof of it's execution by the subscribing witness, as it appeared that one of the assignees had continued to occupy the premises for some time after the act of bankruptcy.

In an action by the lessee against the assignee of a lease, the plaintiff having proved the execution of a counterpart of the lease, and the defendant having put in the original lease, which was produced by a party to whom he had assigned it, it was held to be unnecessary for the plaintiff to call the subscribing witness to prove the execution of the original lease. (4)

the heir claims not under the will, but against the will, and it would be hard that the will should be taken as proved against him, because he produces it.

(1) *Carr v. Burdis*, 1 Cr. M. & R.

785.

(2) 3 Taunt. 62.

(3) 3 Br. & B. 139.

(4) *Burnett v. Lynch*, 5 B. & C. 589.

So, in an action against the vendor of an estate, to recover a deposit on a contract for the purchase, if the defendant, on notice, produces the contract, the plaintiff need not prove the execution. (1)

Where both parties claim similar interests under the instrument produced, the execution of it need not be proved, and extrinsic evidence is admissible to prove the fact; for, it cannot appear from the inspection of the instrument, until it is read. In a recent case, where the defendant, upon notice from the plaintiff, produced a deed, and it was proved that the defendant's attorney had stated, before the trial, that the defendant claimed through that deed, it was held, that this entitled the plaintiff to put it in without proving the execution, before the defendant's case was opened. (2)

The object, which the opposite party has in using the deed, is immaterial, and, therefore, proof of execution is unnecessary, where the party in possession claims an interest under it, though the object of using the deed be to impugn it on the ground of fraud. (3)

But where a party produced, at the trial of a cause, a deed which had been some months in his possession, it was held that he was not excused from proving the execution of it, because he received the deed from the adverse party, who formerly claimed a benefit under it. (4)

Handwriting of
subscribing
witness.

Other exceptions relate personally to particular witnesses. It has been held, that, under various circumstances

(1) *Bradshaw v. Bennett*, 1 Mo. & R. 143.

(2) *Doe d. Wilkins v. Wilkins*, 4 A. & E. 86, on the authority of *Knight v. Martin*, Gow, 26. It may, perhaps, be questioned, whether the hearsay of the attorney, not made by way of express admission, was receivable. For other examples of the application of the rule dispensing with proof by a subscribing witness, when the op-

posite party claims under the instrument, see *Doe v. Wainwright*, 1 Nev. & P. 8. *Doe v. Heming*, 6 B. & C. 28.

(3) *Carr v. Burdis*, 1 Cr. M. & R. 785.

(4) *Vacher v. Cocks*, 1 B. & Ad. 145. In *Carr v. Burdis*, 1 Cr. M. & R. 785, Parke, B., observed, that if the deed had been given up before the action, it might have made a difference.

where the evidence of none of the subscribing witnesses to an instrument is available, proof of handwriting will be received. Proof of handwriting is received in the case of the subscribing witness's death, (1) blindness, (2) incompetency to give evidence from insanity, (3) or from infamy of character; (4) in the case also of his being absent in a foreign country, (5) or out of the jurisdiction of the superior English Courts. (6)

With respect to the incompetency of a subscribing witness, on the ground of interest, the rule is, that if a subscribing witness to an instrument be interested therein, both at the time of the attestation and at the trial, he cannot be examined as a witness to prove the execution; nor is proof of his handwriting sufficient for that purpose. (7) But where a defendant, knowing the situation of a person whom he requests to attest the execution of the instrument, is afterwards sued upon it, he cannot raise the objection of interest in the attesting witness. (8)

Interested subscribing witness.

In some cases, where a subscribing witness has acquired an interest after the execution of the instrument attested by him, it has been decided, that proof of his handwriting may be received to establish such instrument; as, where he has been appointed executor or administrator, (9) or has married the person to whom the instrument was given. (10) And it seems, that the principle of these cases may be extended to the case of a person entering into partnership. (11) In such cases it is necessary that the evidence of the subscribing witness's handwriting

(1) *Anon.* 12 Mod. 607.

(2) *Wood v. Drury*, 1 Ld. Raym. 734. *Pedler v. Paige*, 1 Mo. & R. 258.

(3) *Vin. Ab. Ev. T. b.* 48, pl. 12. *Burnet v. Taylor*, 9 Ves. 381. *Currie v. Child*, 3 Camp. 283.

(4) *Jones v. Mason*, 2 Str. 833. *Com. Dig. tit. Testmoigne*, B. 3.

(5) *Coghlan v. Williamson*, 1 Doug. 93. *Wallis v. Delancey*, 7 T. R. 266, c. *Adam v. Kerr*, 1 B. & P. 361.

(6) *Prince v. Blackburn*, 2 East, 250. 1 B. & P. 361. *Ward v.*

Wells, 1 Taunt. 161. *Hodnet v. Forman*, 1 Stark. 90, absence in Ireland.

(7) *Swire v. Bell*, 5 T. R. 371.

(8) *Honeywood v. Peacock*, 3 Camp. 196, action on a bail-bond; the witness was a sheriff's officer.

(9) *Goss v. Tracey*, 1 P. Wms. 287. *Godfrey v. Norris*, 1 Str. 34, although it was urged that he might have permitted another to take out administration.

(10) *Buckley v. Smith*, 2 Esp. 697.

(11) *Per Best, Ch. J.*, in *Howell v. Stephenson*, 5 Bing. 493.

should be received, as, otherwise, parties must lose the rights secured by the instruments attested, or forego accepting of situations important to their welfare.

But where a party to the suit has himself caused the disqualification of a subscribing witness, by giving him an interest in the subject matter of the instrument, it has been held, that evidence of his handwriting is inadmissible; as, where a plaintiff in an action on a charter party communicated to the attesting witness an interest in the adventure, subsequently to the execution of the instrument. (1)

Illness.

It seems that illness is not, in general, a sufficient reason for dispensing with the attendance of a subscribing witness. (2) The authorities relative to the use of depositions, in the case of the illness of witnesses, have been considered in a previous part of the Work.

**Absence.
Due inquiry.**

The handwriting of attesting witnesses may be received, where they cannot be found after strict and diligent inquiry. Every case upon this subject must depend on its own peculiar circumstances. It may, however, be useful to give a few examples. In the case of *Wardell v. Fermor*, (3) evidence of handwriting was admitted, on proof that a commission of bankruptcy had been sued out twelve months before against the subscribing witness, who had not appeared at the time fixed for his surrender. Where the clerk of the defendant, who was the subscribing witness to a bond, on being subpoenaed, said, that he would not attend, and the trial had, in consequence of his absence, been put off twice, and inquiry had been made for him at the defendant's house and in the neighbourhood, it

(1) *Hovill v. Stephenson*, 5 Bing. 493.

(2) In *Jones v. Brewer*, 4 Taunt. 47. Mansfield, Ch. J., says, that "perhaps in some instances of sickness" the handwriting of a subscribing witness may be proved; see *Harrison v. Blades*, 3 Camp. 458. *Doe v. Evans*, 3 C. & P. 221.

(3) 2 East, 183. Proof of going abroad twenty years before the trial, and not having been heard of since, *Doe v. Johnson*, Leic. Lent Ass. 1818. It is conceived, that whatever would be presumptive proof of death in general cases, would be so in the case of a subscribing witness.

was held, that a sufficient foundation had been laid for the reception of secondary evidence, principally on the ground of collusion. (1)

The answer made to inquiries, whether at public offices, or at the residence of the subscribing witness, or of his relatives, or in his neighbourhood,—even what he has said or written himself,—appears to have been received in some cases. Such evidence appears to be admissible, where it is of an original, and not of a hearsay character; with regard to which, the distinction, as we have seen, often leads to questions of great nicety. (2)

In the case of *Parker v. Hoskins*, (3) evidence of the handwriting of a subscribing witness was received, an inquiry after him having been made at the Admiralty, from which it appeared by the last report, that he was serving on board some ship, but in what ship it was not known. In the case of *Wyatt v. Bateman*, (4) a subscribing witness was not produced, but his father proved, that he had parted on bad terms with his son, that his son afterwards enlisted in the army, and that, upon inquiry at the war-office, he was informed that the regiment, in which his son had enlisted, had sailed for India.

In *Kay v. Brookman*, (5) it was held sufficient, for dispensing with the necessity of calling the subscribing witness, to show, that he expressed an intention of leaving the country, and that he had reasons for doing so, in order to avoid a criminal charge, and that his relations had not seen him since he expressed such intention of departing. In the case of *Crosby v. Percy*, (6) the Court of Common Pleas held, that evidence of the handwriting of an attesting witness had been properly admitted, after proof that diligent inquiry had been made for

(1) *Burt v. Walker*, 4 B. & A. 699.

(2) *Vide supra*, part 1, *Original and Hearsay Evidence*.

(3) 2 Taunt. 223.

(4) 7 C. & P. 587.

(5) 3 C. & P. 555. See *Morgan v. Morgan*, 9 Bing. 359, though a

letter, not disclosing witness's retreat, was received from him a few days before the trial; it was said that it would have been more satisfactory if the wife of the attesting witness had been called.

(6) 1 Taunt. 365.

him at his usual place of residence, where, in answer to the inquiry, information was received, and also from the father of the attesting witness, that he had absconded to avoid his creditors, and was not to be found. In *Prince v. Blackburn*, (1) two letters received from the subscribing witness, purporting to be written from America, were received in evidence, to shew that he was not within the jurisdiction of the Court. Inquiry after the subscribing witness to a bond, at the residences of the obligor and obligee, has been held sufficient. (2)

In *Doe d. Beard v. Parell*, (3) it was proposed to inquire, whether a subscribing witness had stated where he resided, in order to shew that inquiries had been made at his residence, and that the answer to such inquiries was, that he had gone to America; evidence was also tendered, to the effect, that some seafaring men had said, they had seen the subscribing witness in America: the evidence was rejected.

An instrument, purporting to be attested by a subscribing witness, may be proved, as if there were no subscribing witness, where the name of a fictitious person is inserted as the name of the witness (4); or where the person, who has put his name as the subscribing witness, did so without the knowledge or consent of the parties; (5) or where the subscribing witness, on being called, denies having any knowledge of the execution. (6)

It has sometimes occurred, that a subscribing witness has denied his own handwriting, in which cases an inquiry may arise upon the subjects of handwriting and of identity. This inquiry, though it is one purely of fact, and may be extended

(1) 2 East, 249.

(2) *Cunliffe v. Sefton*, 2 East, 183; see *Pytt v. Griffiths*, 6 B. Moore, 538, *contra*.

(3) 7 C. & P. 617. In *Wardell v. Fermor*, 2 Camp. 282, Lord Ellenborough said, that the proof of search ought to be watched very narrowly. Further upon the subject of search after attesting witnesses, see *Miller v. Miller*, 2 Bing. N. C. 76.

(4) *Fasset v. Brown*, Peake, 23.

(5) *M'Craw v. Gentry*, 3 Camp. 232. 4 Taunt. 220.

(6) *Grellier v. Neale*, Peake, 145. *Ley v. Ballard*, 3 Esp. 173. *Fitzgerald v. Elsee*, 2 Camp. 635. *Lemon v. Dean*, *ib.* 636, n. *Talbot v. Hodgson*, 7 Taunt. 251. *Boxer v. Robeth*, Gow, 175. *Phipps v. Parker*, 1 Camp. 412, is therefore overruled.

o great length, and attended with much difficulty, must be decided on by the Judge, not by the jury.

Where there is more than one attesting witness, the absence of all must be accounted for, before evidence of handwriting can be given. (1) But when the absence of all the subscribing witnesses is accounted for, it will be sufficient to prove the handwriting of one of them. (2) Where it is competent to prove the handwriting of the subscribing witness, it is not necessary to prove the handwriting of the party to the instrument. (3)

Several witnesses.

Handwriting of party.

Considerable doubt appears to have been entertained, concerning the effect of proving the handwriting of a subscribing witness. It has always been considered that it was equivalent to the proof of the execution of the instrument by the parties named in it; but, as it does not prove that the party executing the instrument was the party to the suit, it has been thought, and the weight of authority seems to establish, that proof of identity is necessary. (4) There is, perhaps, no answer to this view of the question, except that the requiring of such proof would be attended with general inconvenience, and frequently with a failure of justice, whilst the dispensing with a link in the evidence, on such occasions, would rarely occasion a person to be improperly fixed with a liability, in consequence of

Handwriting of witness, effect of.

(1) See *Cunliffe v. Sefton*, 2 East, 183.

(2) *Adam v. Kerr*, 1 B. & P. 360.

(3) *Kay v. Brookman*; 7 C. & P. 556.

(4) The previous authorities were examined in the Court of Exchequer, in *Whitelocke v. Musgrove*, 1 Cr. & M. 521, where it was held, that proving the handwriting of a subscribing witness did not dispense with some evidence of the identity of the party. Lord Tenterden always inclined to a different opinion. *Page v. Mann*, M. & M. 79, even where the defendant was a marksman. *Michell v. Johnson*, M. & M. 176. So also Chief

Justice Best, *Kay v. Brookman*, M. & M. 287. See *Wallis v. Delancey*, 7 T. R. 266, n. As to Lord Kenyon's opinion, *Parkins v. Hawkshaw*, 2 Stark. 239. It seems that slight evidence of identity will suffice, *Nelson v. Whittall*, 1 B. & A. 19. *Gough v. Cecil*, cited Selw. N. P. 516, n. as that the defendant was present when the instrument was prepared, or that the maker of the instrument resided in the same place. In *Whitelocke v. Musgrove*, *supra*, it seems to have been considered that slighter evidence than proof of the defendant's handwriting would suffice.

the identity of a name. It may be observed, that in general it would be much more easy to disprove an identity which did not exist, than, in a true case, to establish it's existence.

Secondary evidence.

Secondly, on the admissibility of secondary evidence of writings.

If a party intend to use a written instrument, he ought to produce the original, if he has it in his possession ; he cannot give secondary evidence of writings, until all the sources of primary evidence are exhausted. And it is an established rule, that all originals must be accounted for, before secondary evidence can be given of any one. (1)

Notice to produce.

In case the opposite party be in possession of a written instrument, secondary evidence cannot, in general, be given of it's contents, without a notice to produce the original. (2) This rule has been made with good reason, in order that the party shall endeavour to obtain the best evidence, which the nature of the case allows. This rule has been recently held to extend to cases, where there is evidence to prove the destruction of an instrument ; when it is once traced to the hands of the opposite party, no further evidence can be given of it, without a notice to produce. (3)

In general, one party has not the means of compelling the other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit. (4) If such evidence is required, the rule both in civil and in criminal

(1) Per Parke, J., in *Alivon v. Furnival*, 1 Cr. M. & R. 292, in which case the Court were not satisfied that there existed any such duplicate original as had the same binding force and effect on the defendant as the one which was accounted for. Per Parke, J., in *Brown v. Woodman*, 6 C. & P. 206 ; B. N. P. 254 ; *Rex v. Castleton*, 6 T. R. 236. *Dixon v. Haigh*, 1 Esp. 409.

(2) *Rex v. Stoke Golding*, 1 B.

& A. 173.

(3) *Doe d. Phillips v. Morris*, 3 Ad. & E. 50. It would seem, however, that the proof of the destruction of the instrument shewed that it was no longer in the possession of the opposite party, and if not in his possession, the reason for requiring the notice fails.

(4) See the case of *Entick v. Carrington*, 19 Howell's St. Tr. 1073.

cases, (1) is to give the opposite party or his attorney (2) a regular notice to produce the original, which is in his possession; not, that on proof of the notice he is compellable to give evidence against himself, or that, if he refuses to produce the papers required, such a circumstance is to be considered as conclusive against him, (3) but the consequence will be, that the other party, who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy, or give parol evidence of the contents.

Before this secondary evidence can be admitted, it ought to be clearly shown, that the writing required is in the possession of the other party. The degree of evidence, which may be necessary to prove the fact of possession, will depend so much on the nature of the transaction, and on the particular circumstances of each individual case, that it is scarcely possible to lay down any general rule upon the subject. Slight evidence may be sufficient, in many cases, to raise a presumption, that the writing is in the possession of a party, when it exclusively belongs to him, and regularly ought to be in his possession according to the course of business. In the case of *Henry v. Leigh*, (4) the solicitor to a commission of bankrupt proved, that he had been employed by the defendant to solicit his certificate under the commission, and that, looking at the entry of charges, he had no doubt the certificate was allowed: it was therefore presumed, that the certificate came into the defendant's possession.

Proof of deed
in party's pos-
session.

In certain cases, although the written instrument, which is required, is not in the possession of the party to the suit, but in the possession of a third person, yet if there is a privity between such third person and the party, or if the instrument may be considered as under the control of the party, a notice to the party may be sufficient. Thus, in the case of

Possession of
third persons.

(1) *The Attorney-General v. Le Merchant*, 2 T. R. 201, n.

(2) 1 T. R. 203, n. *Cates q. t.*
v. Winter, 3 T. R. 306.

(3) *Cooper v. Gibbons*, 3 Camp. 363.

(4) 3 Camp. 502.

Captain. *Baldney v. Ritchie*, (1) which was an action against the owner of a vessel for goods supplied for the use of the vessel, Lord Ellenborough held, that a notice to the defendant to produce an order, which he had given to the captain, was sufficient to admit the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain. On the same principle, a check given by a party to a third person, which would be in the possession of the banker of the party, has been considered as in the possession of the party himself, within the meaning of the rule as to notices for the production of papers. (2) So, in an action against a sheriff, notice to the defendant's attorney to produce a warrant, which, after execution, was returned to the defendant's under-sheriff, has been held sufficient to entitle the plaintiff to give secondary evidence of the contents. (3) In an action against two executors, where a notice had been served upon them jointly, and one had suffered judgment by default, it was held, that the plaintiff might give secondary evidence of a receipt in the possession of that defendant, who had suffered the judgment by default. (4)

Independent possession. But where a paper is in the possession of a person acting in an independent character, although the party to the suit justifies under the authority of that person, notice to the party is insufficient. (5) And the person served with the notice is insufficient. (5) And the person served with the notice

Right to retain. should have such a right to the document as should entitle him not merely to inspect, but also to retain it. Accordingly, secondary evidence of a document, to produce which a notice had been given, was held not to be admissible, when the document

(1) 1 Stark. 338.

(2) *Partridge v. Coates*, R. & M. 156. *Burton v. Payne*, 2 C. & P. 520. *Sinclair v. Stephenson*, 1 C. & P. 582.

(3) *Taplin v. Atty.*, R. & M. 164. 3 Bing. 164. In that case, *Martin v. Bell*, 1 Stark. 415, was distinguished, inasmuch, as in that case, the paper was not traced to the hands of the under-sheriff.

(4) *Beckwith v. Benner*, 6 C. & P. 682. See the criminal cases of *Le Merchant* and *Colonel Gordon*,

1 Leach, 300, n. In the latter case a letter was traced into the possession of the prisoner's servant.

(5) *Evans v. Sweet*, R. & M. 83. Justification of assault, in assisting the party who had possession of the document, and who was bail for the plaintiff, in arresting the plaintiff, see *Rex v. Pearce, Peake*, 76. *Pritchard v. Symonds*, B. N. P. 254. *Whitford v. Tuting*, 10 Bing. 395, possession by member of committee.

was kept by a stakeholder between the party in the cause and a third person. (1)

The notice to produce should refer to the documents required with sufficient particularity. It has been held, that a notice to produce "all letters, papers, and documents touching and concerning the bill of exchange mentioned in the declaration," is too general, and that the notice ought to have pointed out the particular letter required. (2)

Form of notice.

Notices to produce ought to be served on the attorney, if there is one, (3) and not upon the party in the cause. It is sufficient to give notice to the attorney, even in a *qui tam* action. (4) Where the attorney has been changed, a notice to produce, served on the first attorney, is sufficient to entitle the party to call for the production of the document on the trial. (5)

Service on whom.

With respect to the time of serving the notice to produce, it is the practice to require a notice for the assizes to be served before the commission-day, (6) at least if the party and his attor-

Time of service.
Assizes.

(1) *Parry v. May*, 1 Mo. & R. 279. Where a party had notice to produce a particular instrument, but did not say that he had not got it, though he had, in fact, delivered it to the Stamp-office, the other party was allowed to give secondary evidence of the contents, *Sinclair v. Stephenson*, 1 C. & P. 585.

(2) *France v. Lucy*, R. & M. 341. *Jones v. Edwards*, M'Cl. & Y. 139, "letters, and copies of letters, and all books relating to this cause." Notice to produce may be by parol, *Smith v. Young*, 1 Camp. 440. If the title of the cause be misdescribed in the notice, it will be bad, *Harvey v. Morgan*, 2 Stark. 19. If notice be in writing, and also by parol, it will be sufficient to prove the parol notice, *Smith v. Young*, 1 Camp. 440.

(3) *Per Gurney, B., Houseman v. Roberts*, 5 C. & P. 394.

(4) *Cates v. Winter*, 3 T. R. 306.

(5) *Doe v. Martin*, 1 Mo. & R.

242.

(6) *Trist v. Johnson*, 1 Mo. & R. 259. The plaintiff's attorney lived forty miles off from the assize town; the Judge ruled, that the service ought to be before the commission-day, "to enable the party to bring the papers required." It did not appear where the party resided. Upon a trial for arson, the commission-day was on the 15th of March, the trial came on upon the 20th: a notice to produce, served on the defendant in gaol on the 18th (his residence being ten miles distant), was held insufficient, *Rex v. Ellicombe*, 5 C. & P. 522; 1 Mo. & R. 260, S. C. *George v. Thompson*, 4 Dowl. P. C. 656, service at five o'clock on the commission-day is too late, at least under particular circumstances. *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182, S. P. See also as to service of notice at the assizes, *Hargest v. Fothergill*, 5 C. & P. 303.

Town causes. ney do not reside at the assize town. In town causes, service of notice on the attorney on the evening previous to the trial is, in general, sufficient. (1)

Special circumstances. The reasonableness of the time of serving a notice must depend upon the circumstances of the particular case. Among these circumstances one very material is, whether the document required to be produced is from its nature to be presumed to be in the possession of the client or of the attorney. Where a document was such as that it would not be presumed to be in the possession of the attorney, service upon the attorney on the evening previous to the trial was held not to be sufficient, although the client resided in London. (2) Where a person goes abroad and leaves his attorney to conduct a trial in which he is a party, it is to be presumed that he leaves with him all papers necessary to the conduct of the trial. (3) In a late case, the doctrine in *Bryan v. Wagstaff*, was assented to by Lord Tenterden; but he held, that it was for the Judge to determine, whether the papers, required to be produced, were so necessarily connected with the cause, as to render it probable that they would be delivered to the attorney; and observed, that he was not sure that the rule ought to be extended to a case where the party resided in England. (4)

Non-production, consequence of.

A party, called upon to produce a paper, must either pro-

(1) Per Gurney, B., in *Atkins v. Meredith*, 4 Dowl. P. C. 659. In *Houseman v. Roberts*, 5 C. & P. 394, service on the party on Saturday evening for Monday, was held insufficient; and see *Sims v. Kitchen*, 5 Esp. 46. *Atkinson v. Carter*, 2 Chit. 403.

(2) *Atkins v. Meredith*, 4 Dowl. P. C. 659. The service was at seven o'clock in the evening previous to the trial; the notice was to produce a tradesman's books.

(3) *Bryan v. Wagstaff*, R. & M. 327. The letter described in the notice was sufficiently connected with the subject of the trial; the notice was served on the evening

next but one before the trial.

(4) *Vice v. Lady Anson*, M. & M. 97. *Rex v. Atwood*, K. B. sittings after Hil. T. 1828. It should seem, that the principle of the rule extended to a temporary absence abroad. *Lady Anson* was in Scotland; the service on the attorney was between seven and eight o'clock on Saturday evening, and the cause was tried the next Wednesday. See *Affalo v. Fourdrinier*, M. & M. 334, as to what documents are necessarily connected with a cause. As to various circumstances affecting the question, what is a reasonable notice, see *Doe v. Grey*, 1 Stark. 283.

duce it when called upon, or not at all ; he cannot avail himself of it, in a subsequent stage of the cause. Thus it has been held, that a party, after refusing to produce a document, could not put it into the hand of a witness, at a later period of the cause, in order to ask him at what time an interlineation was made in it, (1) or in order to shew that the instrument is attested by witnesses, who ought to be called. (2)

It has been said, the only consequence of giving a notice to produce is, that it entitles the party giving it, after proof that the document is in the hands of the party to whom it is given, or of his agent, to go into secondary evidence of its contents, and does not authorize any inference against the party failing to produce it. (3) It seems, however, that such an inference would, in most cases, be a just one ; as for example, if an action be brought by a tradesman, and the right of action depends on the fact, whether credit has been given to one or another person, the circumstance of the plaintiff withholding his books, in such a case, would seem to warrant the inference, that he had not, in those books, given credit to the person against whom the action is brought. Whatever rule may be laid down by the Courts on this subject, it should seem, that it would be impossible to prevent a jury from being influenced by such a suppression of evidence. (4)

If one party calls for books or writings in the possession of the other party, but, when they are produced, declines using them, the mere calling for them will not make them evidence for the adverse party. (5) "It may," said Lord Kenyon, "be matter of observation to the counsel on the other side, that the entries in the books were in favour of his client, but cannot entitle him to offer the books in evidence to the jury. If, how-

Books called for, but not used.

(1) *Doe d. Higgs v. Cockell*, 6 C. & P. 525.

(2) *Jackson v. Allen*, 3 Stark. 74. The like rule in the case of the non-production of a dog at the proper time, *Lewis v. Hartley*, 7 C. & P. 405.

(3) *Cooper v. Gibbons*, 363.

Lawson v. Sherwood, 1 Stark. 315.

(4) See per Lord Lyndhurst, Ch. B., in *Bate v. Kinsey*, 1 Cr. M. & R. 41. Per Lord Mansfield, in *Roe v. Harvey*, 4 Burr. 2484.

(5) *Sayer v. Kitchen*, 1 Esp. N. P. C. 210.

Books inspected.

ever, the party who has called for the books inspects them, he thereby makes them evidence for the other party, although he has not himself used them in evidence. (1)

Time for demanding.

The regular time of calling for the production of papers and books is not until the party who requires them has entered upon his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to their contents, although the notice to produce them is admitted. (2) "The evidence," said Lord Ellenborough, in the latter of the cases here cited, "cannot in strictness be anticipated, although it may be rigorous to insist upon the rule, and a close adherence to it may be productive of inconvenience."

Notice, when dispensed with.

The principle of the rule, which requires that a party shall have previous notice to produce a written instrument in his possession, before the contents can be proved as evidence in the cause, will not apply to cases, where, from the nature of the proceedings, the defendant has notice, that the plaintiff means to charge him with the possession of the instrument. It cannot, in such cases, be necessary to give any other notice, than the action itself supplies. In an action of trover, therefore, for a bond, the plaintiff has been allowed to give parol evidence of the contents, to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce the original. (3) And on a prosecution for stealing a promissory note, or other writing, described in the indictment, parol evidence of the contents will be received, without any formal notice to the prisoner to pro-

Notice from the proceedings.

1. *Wharam v. Routledge*, 5 Esp. N. P. C. 235. *Calvert v. Flower*, 7 C. & P. 386. The principle of this rule is not obvious, and the weight due to a party's statements in his own books, in consequence of the opposite party declining to use them, after inspection, is difficult to estimate.

(2) *Graham v. Dyster*, 2 Stark,

N. P. C. 23. *Sideways v. Dyson*, 2 Stark. N. P. C. 49.

(3) *How v. Hall*, 14 East, 274. *Scott v. Jones*, 4 Taunt. 865. *Jolley v. Taylor*, 1 Camp. 143. *Butcher v. Jarrat*, 3 Bos. & Pull. 143. *Wood v. Strickland*, 2 Merivale, 461. *Colling v. Treweek*, 6 B. & C. 398. Per Bailey, J., see *Whitehead v. Scott*, 1 Mo. & R. 2.

duce the original. In *Aickle's* case, (1) on an indictment for stealing a bill of exchange, all the Judges held, that such evidence had been properly admitted, though it was proved in that case, that the bill had been seen, only a few days before the trial, in a state of negotiation, in the hands of a third person, who had been served with a *subpœna duces tecum*, but who did not appear. In *Layer's* case, (2) on an indictment for high treason, where it was proved, that the prisoner had shewn a person the paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. In the case of *De la Motte*, (3) on an indictment for a traitorous correspondence with the French government, where the question was, whether examined copies of the treasonable papers, which had been secretly opened at the post-office, and copied, and then forwarded to their place of destination, were admissible in evidence; the Court held, that they might be admitted, after proof that the originals were in the handwriting of the prisoner.

A description or copy of a writing, may for some purposes, be in the nature of original and primary evidence, not of hearsay or secondary evidence; in which case notice to produce will not be necessary. In the case of the *King v. Hunt*, (4) it was held, that parol evidence of inscriptions and devices on banners

Copy original evidence.

(1) 1 Leach, Cr. Ca. 330. *Butler's* case, 13 Howell's St. Tr. 1254, which was a prosecution for the forgery of a bond. So in *Spragge's* case, cited 14 East, 276, for forgery, where the prisoner swallowed the note.

(2) 6 St. Tr. 263. 16 Howell's St. Tr. 170, S. C. *Francia's* case, 15 Howell's St. Tr. 941. *Rex v. Moors*, 6 East, 421, n.

(3) *Cor. Buller, J., and Heath, J.*, O. B. 1781, 1 East's P. C. 124, from MS. of Gould, J. These copies were rejected on another ground, because the originals had not been traced to the prisoner's possession. See 21 Howell's St. Tr. 737.

(4) 3 B. & A. 574. Some evidence was given that the banners

were in the possession of a constable, but this was held not to affect the question. The principle on which the copy of resolutions was received, appears more satisfactory than that on which the reception of the inscriptions on the banners was founded. In *Gorton v. Dyson*, 1 B. & B. 221, it seems to have been considered that a will upon which the defendants had obtained probate, was primary evidence as against the executors, to prove an acknowledgment in the will. It may have been thought primary evidence, on the ground of the act of Court being indorsed on it; it was clearly good secondary evidence.

and flags displayed at a meeting, and also a copy of resolutions delivered by one of the defendants to a witness, as resolutions intended to be proposed, and which copy corresponded with the resolutions that the witness afterwards heard read from a paper, were admissible without a notice to produce. It should seem that the notice to produce the banners was dispensed with, on the ground, that their effect depended on public exhibition, and that the evidence was of the same description, as if a witness had said, that he saw banners displayed; and with regard to the copy of the resolutions, this had been delivered by one of the defendants, and, therefore, as evidence by way of admission against him, the paper was as good evidence, if not better, than any other could have been. Upon an indictment for administering unlawful oaths, where a witness swore to some words, by way of oath, spoken by the prisoner, who held a paper in his hand at the same time that he uttered them, it was held, that no notice to produce the paper was necessary. (1) In such a case, what a prisoner had said would clearly be evidence against him, whether it corresponded with the written paper or not.

Fraudulent
possession.

Nor does the principle of the rule apply to the case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as, where a witness was called, on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared, that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence of the contents was admitted, because the paper belonged to the witness, and had been secreted in fraud of the *subpœna*. (2)

Duplicate.
Original counter-
part.

Notice to produce is not required, where the paper offered in evidence is a duplicate original, (3) or a counterpart, (4) or

(1) *Rex v. Moors*, 6 East, 419, n.

(2) *Leeds v. Cook*, 4 Esp. 256.
Doe d. Pearson v. Ries, 7 Bing.
724.

(3) Per Bayley, J., in *Colling v. Treweek*, 6 B. & C. 398. *Philipson*

v. Chace, 2 Camp. 110, per Lord
Ellenborough.

(4) *Burleigh v. Stibbs*, 5 T. R.
465. *Roe d. West v. Davis*, 7
East, 363. *Mayor of Carlisle v.*
Blamire, 8 East, 487.

where the instrument to be proved is a notice, as a notice to quit, a notice of the dishonor of a bill of exchange, or a notice of action. (1) And where an attorney's bill duly signed has been delivered to the defendant, a copy, though not signed, is admissible in evidence, without proof of notice to produce the original, on the ground that the bill delivered is considered as a notice. (2) A duplicate which has been taken from an original letter, at a single impression, by means of a copying machine, is still only a copy; and, therefore, cannot be read, without a previous notice to the other party to produce the original, (3) or without proof that the copy so taken was afterwards on comparison found to be correct.

Notice.

Attorney's bill.

Machine copy.

Another exception may be mentioned, in the case of an action by a seaman to recover wages, in which the captain is compellable to produce the ship's articles at the trial, though he has not received a notice for that purpose, if he would found any objection upon them, or resort to them in making his defence. The statute has introduced an exception to the general rule upon this subject. (4)

4. Action by seaman.

It seems now to be the better opinion, that neither party will

Deed in court, in possession of the other party.

(1) Notice to quit, 2 B. & P. 41. Notice of dishonor, *Kene v. Beaumont*, 3 Br. & B. 288, decided after collecting the opinion of the Judges. *Ackland v. Pearce*, 2 Camp. 601. *Roberts v. Bradshaw*, 1 Stark. 28. *Langdon v. Hulls*, 5 Esp. 157. Notice of action to magistrate, and demand of copy of warrant from constable, 2 B. & P. 39. This rule is founded apparently upon the convenience of general practice.

(2) *Colling v. Treweek*, 6 B. & C. 394, where the general subject was much considered. It was said, that if the copy had been signed, it would have been a duplicate original. As to which, *Dallas*, Ch. J., in *Kene v. Beaumont*, 3 Br. & B. 288, said, that he could not see any great difference between a duplicate original and a copy made at the time. It should seem, that the doctrine as to duplicate origi-

nals, at it's commencement at least, related to cases where more than one instrument of the same purport was signed by all the contracting parties. It was said, in *Colling v. Treweek*, that the case of an attorney's bill might be considered as falling within that class of cases, where notice to produce has been held unnecessary, on the ground that, from the nature of the suit, the opposite party must know that he is charged with the possession of the instrument.

(3) *Nodin v. Murray*, 3 Camp. 228. See *Holland v. Reeves*, 7 C. & P. 38. *Rex v. Watson*, 2 Stark. 129, n. (a), referring to *Rex v. De Beringer*.

(4) *Bowman v. Manzelman*, 2 Camp. 315. St. 2 G. 2, c. 36, s. 8, as to foreign voyages; st. 31 G. 3, c. 39, s. 6, as to the coasting trade.

be allowed, either in an examination in chief or in a cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession, in Court, at the time of the trial; and that the opposite party may object to such parol evidence of the contents, on account of his not having received a previous notice to produce the original. In the case of *Doe* on the demise of *Haldane* and *Urry v. Harvey*, (1) the Judges of the Court of King's Bench appear to have differed in opinion upon this point. In that case, title was deduced to Haldane under a will; but one of the plaintiff's witnesses said, on cross-examination, that Haldane had conveyed all interest in the premises to Urry, before the time of the demise in the declaration, and that the deed was in Court. Upon this it was insisted, that, as the plaintiff's witness proved the title out of Haldane, and as the deed of conveyance was in the Court, the deed ought to be produced in evidence to shew a title in Urry, the other lessor of the plaintiff. The counsel for the plaintiff, on the contrary, refused to produce the deed, insisting, that the plaintiff ought to recover under the one or the other of the lessors; for, if the one had parted with the title, the other had acquired it. But Mr. J. Aston, who tried the cause, being of opinion, that the plaintiff ought to give further evidence to ascertain the title, under which he was to recover the term, nonsuited the plaintiff: and on a motion afterwards for setting aside this nonsuit, Lord Mansfield, after observing that in the action of ejectment the plaintiff could not recover except upon the strength of his own title, said, "It was plain the plaintiff had no title under Haldane, who had conveyed away all the interest in the premises to the other lessor, and that as to his claim of a title under Urry, the plaintiff had not proved any title; the jury could not have found for the plaintiff under the deed of conveyance to Urry, unless it were produced, and probably there was something in the deed, which would have shewn, that Urry had no title." Lord Mansfield laid the principal stress on the fact of the plaintiff's refusing to produce the conveyance from Haldane, which was admitted to be in Court. "The

(1) 4 Burr. 2484. See *Doe d. Wartney v. Grey*, 1 Stark. N. P. C. 283.

want of notice," he said, "was no objection in this case, because they had the deed in Court; and the refusal to produce it warranted the strongest presumption, that neither of the lessors had any title." Mr. Justice Aston and Mr. Justice Willes agreed in opinion with Lord Mansfield. But Mr. Justice Yates differed from the rest of the Court. "He founded himself," he said, "upon the rules of evidence. The fact of the conveyance coming out on cross-examination could make no difference. The plaintiff's counsel were not obliged to produce the deed, for no man can be obliged to produce evidence against himself: the only consequence of a notice to produce would have been the admission of inferior evidence." Upon this case it may be observed, that the fact of Haldane's having conveyed away all his interest to Urry seems to have been assumed, as satisfactorily proved; but from the opinion of Mr. Justice Yates, which seems to be the better opinion, it may be collected, that there was no legal proof of any conveyance of title out of Haldane, and that the answer of the witness, upon which the defendant's argument rested, was as inadmissible in evidence on the cross-examination, as it would have been on an examination in chief. The true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the original; and it does not appear to be a sufficient answer to say that the deed is in Court; for, if the party had received a regular notice to produce it, he might have come prepared with evidence to repel any inference which the production of the deed might have raised against him. It was expressly decided in *Doe d. Wartney v. Grey*, (1) that although a party has a written instrument in Court, parol evidence of it cannot be given, if there has been no notice to produce.

Where writings are not in the possession of the opposite Writings not forthcoming.

(1) 1 Stark. 283, see the point ruled by Lord Kenyon there referred to. The Court of Exchequer appear to have inclined to the same opinion, in *Bate v. Kinsey*, 1 Cr.

M. & R. 41, though they do not appear to have considered the rule as settled, see *Cooke v. Hearne*, 1 Mo. & R. 201. *Doe v. Morris*, 4 Nev. & M. 598.

Privileged.

party, secondary evidence is admissible, wherever it is out of the power of the party, requiring their use, to produce them. This inability to produce writings, may arise from various causes. Secondary evidence of writings is admissible, where the party cannot produce the original, which is in a foreign country, and not legally removable from its place of deposit. (1) So where the non-production of an instrument is privileged on grounds of policy, secondary evidence of its contents may be given; as, where a document is in the hands of an attorney, who is not allowed to produce it, from regard to the privilege of his client. (2)

Writing destroyed.
Lost.

Secondary evidence is admissible of writings which are proved to have been destroyed, or which cannot be found, after due inquiry. With regard to what shall be deemed to be due inquiry after a document, in order to let in secondary evidence, cases must very much depend on their particular circumstances, especially upon the importance of the instrument, or some usage or practice which may exist, respecting the custody of such documents. (3)

Course of duty.

Where it is the duty of a party in possession of an instrument to deposit it in a particular place, if it be not found there, the presumption is that it is destroyed; and, therefore, where an indenture of apprenticeship was traced into the possession

(1) *Alivon v. Furnival*, 1 Cr. M. & R. 277, where a letter was filed in the English Court of Chancery, pursuant to an order of that Court, it was ruled that secondary evidence was not admissible, it being in the power of either party to produce it, on application to the Court, *Williams v. Munnings*, R. & M. 18.

(2) *Mills v. Oddy*, 6 C. & P. 732. *Manton v. Downes*, 1 A. & E. 31. It was held, in this case, that if the Judge had done wrong in considering the communication privileged, the defendants could not object, not being privileged parties.

It may, perhaps, be thought, that the receipt of *parol* evidence in such a case was a ground of objection by the parties, though they could not have objected to the Judge improperly compelling the production of the original instrument.

(3) *Rex v. Stourbridge*, 8 B. & C. 98. There was no evidence to shew that the overseer to whom the indenture was sent was dead, see *M'Gahey v. Alston*, 2 Mee. & W. 214, as to search in the proper place of deposit for parish documents.

of the overseers of a parish, it was held sufficient to make search for it in the parish chest, as it was the duty of the overseers to deposit it there. (1)

The presumption is, that a useless instrument will be destroyed. (2) Proof, by a witness, that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in secondary evidence. This was determined by the Court of King's Bench, in the case of *Mr. Justice Johnson*. (3) A similar point arose, in the case of *Kensington v. Inglis*, (4) in the course of which it became necessary to prove the loss of a licence: the witness said, it was his practice to destroy or put aside such licences amongst the waste papers of his office, as not being of any further use, and that he supposed he had disposed of the licence in question in the same manner as other licences for ships, whose voyages had been performed; but was not sure that it was destroyed. The witness added, he had been afterwards applied to for this licence, and searched for it, but he did not recollect whether he had found it or not: though he did not think that he had found it. Lord Ellenborough, adverting to the evidence, in delivering the judgment of the Court, said, "We are of opinion, that this evidence satisfies what the law requires in respect of search, and establishes with reasonable certainty the fact of the licence being lost. It was not to be expected, that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time on account of any importance being supposed to belong to it." So in the case of *Brewster v. Sewell*, (5) (which was an action against the defendant for publishing a libel, charging the plaintiff with having defrauded an insurance company in settling a loss upon a policy against fire,) where it became necessary, in proof of an averment in the pleadings, to account for the non-production of the policy, with a view to give secon-

Useless papers:

(1) "The degree of diligence to be used in searching for a deed, must depend on the importance of the deed, and the particular circumstances of each case." Per Best, Ch. J., in *Gully v. Bp. of*

Exeter, 4 Bing. 298.

(2) Per Bayley, J., in *Rex v. Farleigh*, 6 D. & R. 153.

(3) *Rex v. Johnson*, 7 East, 66.

(4) 8 East, 278, 288.

(5) 3 Barn. & Ald. 296.

dary evidence of its contents, it appeared, that the policy, which had been effected about seven years before, had become useless, in consequence of a second policy having been effected: the policy had probably been returned to the plaintiff after settling the loss. The clerk of the plaintiff's attorney, a few days before the trial of the action, searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but also in every place which the clerk thought likely to contain a paper of this description; the question was, whether this was a sufficient search; the Court of King's Bench held, that it was sufficient. And in the case of *Freeman v. Arkell*, when it became necessary to prove the contents of an information, which had been taken before a magistrate, the magistrate proved, that he had delivered the information to the clerk of the peace or to his deputy; the clerk of the peace proved also, that no such information was to be found in the office; that a bill had been presented on the charge in this information, which was rejected by the grand jury, and that it was usual in such cases to destroy the informations; the Court held that this was a sufficient search, without calling the deputy clerk; for if the information was delivered to the deputy, it was delivered to him as agent for the clerk of the peace, and not for his own purposes; it should not therefore be presumed to be among his private papers, but rather to be among those in the custody of the clerk of the peace. (1)

Power of
attorney.

On the impeachment of Lord Melville, the Committee of Managers, in order to prove the contents of a letter of attorney, (under which, it was said, Mr. Douglas had been authorized by Lord Melville to apply to the treasury for monies, from time to time, as his paymaster,) offered in evidence an entry in a book, kept in the Exchequer, which book contained entries of all the letters of attorney for the receipt of money at the Exchequer. It was satisfactorily proved, that no such letter had been found, on a diligent search, among Mr. Douglas's papers shortly after his death; it was proved also, that an official order had been made out for Mr. Douglas to receive money, un-

(1) *Freeman v. Arkell*, 2 B. & C. 494, 497.

der a letter of attorney; and the fact of Mr. Douglas's appointment as paymaster clearly appeared from a letter in Lord Melville's handwriting, dated only two days after the date of the proposed entry. The clerk of the office also proved, that he had made the entry from the original letter of attorney; which entry purported to contain the names of persons, as attesting witnesses to the letter. After argument, the entry was rejected. "There is no legal proof," said the Lord Chancellor, "of Lord Melville's handwriting; it does not appear, whether the attesting witnesses are living or dead; nor does it appear, that Mr. Douglas ever received any money under that appointment." For these reasons, it was determined, that the managers had not entitled themselves to read the paper. Upon this, the managers proceeded further, (1) and tendered in evidence a certificate signed by Mr. Douglas as paymaster, and given by him to the Navy-office, acknowledging the receipt of money by him at the Exchequer; the managers then produced entries in the Bank books, signed by Lord Melville and Mr. Douglas, in the common form of opening an account; and afterwards called a witness, whose name and description corresponded with the name and description of one of the attesting witnesses in the proposed entry; and this witness stated, that he had some recollection, though very slight, (for the entry bore date about twenty-four years before this time,) of providing a stamp for the power of attorney from Lord Melville to Mr. Douglas, and of attesting it at the Navy-pay-office. Upon this evidence, the Lord Chancellor declared his opinion, that the entry was admissible, and the Lords allowed it to be read. (2)

On the hearing of an appeal against an order of removal, (3) the principal question was, whether one person only, or more than one, had been appointed overseer in a particular year; the respondents, who, in order to vacate an indenture of apprenticeship, had to prove, that only one overseer had been appointed in that year, had given notice to the appellants to produce all books and writings in their custody and power, re-

(1) 29 Howell's St. Tr. p. 723,
739.

(2) *Ibid.* p. 739.

(3) *Rex v. Stoke Golding*, 1 B:
& Ald. 173.

Appointment
of overseer.

lating to the appointments of overseers ; the appellants, being called upon to produce under this notice, produced one parish book, which was the only one in existence, and the parish officer, who produced it, proved that no appointments were kept by the parish : the respondents then proceeded to inquire of a witness, as to there having been, in the particular year, one or more overseers ; but, on an objection being taken, the Court of Quarter Sessions held, and the Court of King's Bench afterwards confirmed their opinion, that as the appointments had been in writing, parol evidence could not be admitted. " The question," said Lord Ellenborough, " is, whether the Justices below have done wrong in rejecting the parol evidence. This is clear that the parol evidence could not be admitted, until the case was ripe for the admission of secondary evidence ; now it could not be considered as ripe for that purpose, until the respondent parish had exhausted all the proper means of procuring the primary evidence. Have they done this ? First, as to the appointment itself, they gave a notice to the parish ; and, supposing the parish had the actual custody, that notice would have been sufficient, but this does not appear. Have they then the legal custody ? Certainly not ; for the legal custody is in the officer, who is the person most interested in the instrument, and who requires it's production as a sanction for those acts, which he may be called upon to do under it's authority. Now, here there has not been any notice to the overseer himself. I think, therefore," added Lord Ellenborough, " that, as in this case there has been an omission of the means of exhausting the primary evidence, recourse could not be had to that of a secondary nature."

Some questions have arisen as to the admissibility, and as to the sufficiency of answers to inquiries made in the course of a search after missing documents, and this as well in the case where the persons giving the answers were living, as where they were deceased. (1) In the case of *Rex v. Moreton*, (2)

(1) *Vide supra, Answers to Inquiries after an Attesting Witness, and Original and Hearsay Evidence.* It does not appear, upon what principle, the answer of a deceased person

can be more admissible than that of a living person, it not being against his interest.

(2) 4 M. & S. 48. In the previous case of *Rex v. Castleton*, 6

where it appeared that only one part of an indenture of apprenticeship had been executed, that the pauper and master were both dead at the time of the trial, and that an inquiry for it had been made of the pauper shortly before his death, who said that the indenture had been given up to him after the expiration of his apprenticeship, and that he had burnt it, and an inquiry had also been made of the daughter and sole executor of the master, who said that she knew nothing about it; under these circumstances the Court of King's Bench were of opinion, that a sufficient inquiry had been made to render the parol evidence of the contents admissible.

But on an appeal against an order of removal, where the appellants relied on a settlement of a deceased party by apprenticeship, in order to let in parol evidence of the indenture they called the widow of the deceased, who stated that her husband in his last illness told her, that he received his indentures from his master at the end of his apprenticeship, and wore them out in his pocket: it was held, that, without further proof of inquiry after this indenture, evidence of the conversation was not admissible. It was said by the Court, that the case of *Rex v. Morton*, was distinguishable, as in that case inquiry had been made of the master's executrix. It was observed, that the evidence tendered was of a dangerous kind, and should be received with caution. (1)

On an appeal against an order of removal, it was proved by the pauper, that he had been bound apprentice twenty-three years previous to the trial of the appeal; by an indenture which was signed and sealed, and that he served seven years, and that his master had the indentures, and that when his apprenticeship expired, he asked his master for the indentures, who said that the parish officers had them. It was held, that the declarations of the master, who might have been called as a

T. R. 236, the only part of the indenture not accounted for was traced to the possession of a living person, who, in answer to an inquiry for it, said that she could not find it, nor did she know where it

was. It was held that this was not sufficient evidence of search. And see *Rex v. St. Sepulchre*, 2 Bott. 353.

(1) *Rex v. Rawden*, 2 A. & E. 156.

witness, were not admissible, so as to let in secondary evidence of the indentures. It was said by Bayley, J., that the decision in *Rex v. Morton* did not proceed on the ground, that the declaration of the executrix of the master was admissible; but that, if the declaration of the pauper were admissible so as to shew a possession of the indentures by him, it shewed also that further search and inquiry was unnecessary, because he stated that it had been given up to him, and that he had burnt it. The circumstance that the master was living was apparently relied on in the judgment, and the case of *Rex v. Castleton* was considered as directly in point, inasmuch as the indenture, in that case, was traced to a living person, and the account given by that person, that it could not be found, was not considered sufficient for the purpose of admitting secondary evidence. (1)

Where the master of an apprentice, who was deceased, having had a parish indenture in his possession, failed in business, and an attorney took the management of his affairs and the custody of his papers, which he inspected, but did not find the indenture, it was held, that the proof of these facts afforded a sufficient ground for the admission of secondary evidence, though the master's widow was living, and no inquiry had been made of her respecting it. It was noticed, that the widow was not the executrix, and it was said that it was useless to inquire as to her possession of the indenture, after the evidence of the attorney, who had looked into the master's papers. It was also observed, that in *Rex v. Castleton*, the person, of whom (as the Court held,) inquiry ought to have been made, was proved to have had at one time possession of the indenture. (2)

It is not necessary, in order to shew a sufficient search, to negative every possibility; it is enough to negative every reasonable probability of any thing being kept back. Where an attorney or officer is applied to for documents, the Court will

(1) *Rex v. Denis*, 7 B. & C. 622. And see *Williams v. Younghusband*, 1 Stark. 139, answer to inquiry after policy of insurance held

not sufficient. *Parkins v. Cobbet*, 1 C. & P. 282.

(2) *Rex v. Piddlehinton*, 3 B. & Ad. 462.

assume, till the contrary is shewn, that all the documents relative to the subject are produced. These principles were laid down in the case of *McGahey v. Alston*. (1) In that case a check, which had been drawn on the account of a parish, had been delivered to the paying clerk of the parish, and it was shewn, that the bankers of the parish on the same day paid a sum of that amount, and that their custom was to return the cancelled checks to the paying clerk, and that they were deposited in an apartment in the workhouse; the paying clerk having gone out of office, application was made to his successor for inspection of the checks; he handed to the witness several bundles, which were searched without finding the check in question; it was held, that this was a sufficient search to let in secondary evidence.

When it sufficiently appears, that the sources of primary evidence are exhausted, and that secondary evidence of writings is admissible, the question arises, as to the kind of secondary evidence which may be received.

It has been said, that there are no degrees of secondary evidence; but this doctrine does not appear to be completely settled. (2) Where a defendant had given notice to a plaintiff

(1) 2 Mee. & W. 213. It was said, that, in ordinary cases, the search was not made as for stolen goods. *Vide supra*, as to the proper place of custody of documents, the decisions upon which subject are material to the present inquiry. And further, on the proof of the loss of writings, *Minshull v. Lloyd*, 2 M. & Wel. 450. As to loss of sheriff's warrant, *Bligh v. Wellesley*, 2 C. & P. 400. *Rex v. North Bedburn*, Cald. 452. As to loss of assignment commission of bankruptcy before enrolment, *Giles v. Smith*, 1 Cr. M. & R. 462. Various questions have arisen in the Ecclesiastical Courts respecting proof of the loss of testamentary instruments, see *Wargent v. Hollings*, 4 Hagg. Com. Rep. 249.

(2) Per Parke, J., in *Brown v.*

Woodman, 6 C. & P. 206. In *Doe v. Wainwright*, 1 Nev. & P. several of the Judges appeared to be inclined to the opinion, that an abstract of a deed would not be the best secondary evidence, and that if a copy of it had been proved to be in existence, it might have been necessary to give notice to produce the copy. And see per Best, Ch. J., in *Mann v. Godbold*, 3 Bing. 294, as to degrees of secondary evidence, and that a counterpart was better secondary evidence than a copy, see *Rex v. Castleton*, 6 T. R. 236; B. N. P. 254. An inscription on a tablet in a church, or on a wall, may be proved by parol, though it is usual to shew the witness a copy, *Doe v. Cole*, 6 C. & P. 369.

to produce a letter of which he had kept a copy, and the letter was not produced, it was held, that he might give parol evidence of its contents, and that he was not bound to put in the copy. (1)

Entries by deceased clerks, purporting to be copies of letters, where it has been the duty of the clerks to see that the letters copied by them are sent by the post, are secondary evidence of the contents of the letters, and also amount to proof of the fact of sending the letters. (2)

Attested instrument.

Where a deed, proved to be in the possession of the opposite party, is not produced upon a notice to quit, the person giving the notice may give parol evidence of the contents, without calling the subscribing witness. (3) But where an instrument is destroyed, and the witness is known, he must be called. (4) Where, however, a plaintiff declared on a lost bond, and a witness stated that names of subscribing witnesses were in the bond, but that he did not know the names, it was ruled that the plaintiff might recover without calling either of them. (5)

(1) *Brown v. Woodman*, 6 C. & P. 306. It was intimated, that it might have been different, if there had been a duplicate original. It is to be observed, that the copy and the parol evidence were independent of each other. By some authorities, it appears to have been considered, that a copy of a copy is not evidence, as being one step farther removed from the original, *Gilb. Ev.* 9, per Lord Ellenborough, in *Liebman v. Porley*, 1 Stark. 167.

(2) *Pritt v. Fairclough*, 3 Camp. 305. *Hagedorn v. Reid*, 3 Camp. 377. *Toosey v. Williams*, M. & M. 129. *Vide supra, Hearsay Evidence in the course of business.*

(3) *Cook v. Tanswell*, 8 Taunt. 450. The name of the subscribing witness was mentioned in the notice to produce, but Gibbs, Ch. J., said, that the knowledge of the name of the subscribing witness made no difference in the case. In *Jackson*

v. Allen, 3 Stark. 74, it did not appear that there was a subscribing witness, until the defendant produced the document, which he had no right to do, after declining to do it at the proper time. It seems difficult to reconcile the principle of the case of *Cook v. Tanswell* with the rule, that if the deed be lost, the subscribing witness must nevertheless be called,—excepting that the party withholding a document may have less ground for complaint.

(4) *Gillier v. Smither*, 2 Stark. 528.

(5) *Keeling v. Ball*, Peake's Ev. App. 82, per Lord Kenyon. The decision, however, since containing a general proposition, might appear questionable, since the names of the attesting witnesses may only be known to the party suing. The decision appears to have been in the case of a bond.

Where a plaintiff had lost his part of an agreement under seal, after it had been duly stamped, and the defendant, upon notice, produced his part unstamped, it was held, that the defendant's part, though unstamped, was good secondary evidence. (1) Where an unstamped copy of an instrument is produced as secondary evidence, it may, under various circumstances, be presumed that the original was stamped. (2)

Unstamped
copy.

The recital of a deed in another deed is evidence of the recited deed, if the original is lost, against the party who executed the reciting deed, or against any person claiming under him. (3) And when possession has gone along with a deed during many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, though not proved to be true, because in such case it may be impossible to give better evidence. (4)

A witness, in speaking to the contents of a lost writing, may assist his recollection by entries in his memorandum-book; but these entries are not in themselves admissible as evidence; so that if the witness has not the memorandum-book at hand, ready to be produced, no objection can be taken on account of its absence. In the case of *Kensington v. Inglis*, before cited, (5) the witness, who proved the loss and contents of a licence, had kept a memorandum-book, in which he made entries of licences for his own information, and for the information of the governor of the country, who granted the licences; he gave it to the governor, but did not know where the book then was, or what the governor had done with it: "As to the non-production of the memorandum-book," said Lord Ellenborough, "that book,

Memorandum
book.

(1) *Munn v. Godbold*, 3 Bing. 292. *Waller v. Horsfall*, 1 Camp. 501. *Garnons v. Swift*, 1 Taunt. 507, to the same effect.

(2) See *Pooley v. Goodwin*, 4 A. & E. 94. *Crisp v. Anderson*, 1 Stark. 35. *Waller v. Horsfall*, 1 Stark. 35.

(3) Com. Dig. tit. Evidence (B. 5),

Skipwith v. Shirley, 11 Ves. 64, 5 B. & C. 601.

(4) *Buller*, N. P. 254. Registry-book at Custom-house insufficient secondary evidence of affidavit on which certificate of registry obtained, *Teed v. Martin*, 4 Camp. 90.

(5) 8 East, 279, 289.

if it had existed, and been in the witness' hand ready to be produced, could not have been produced at the trial, in proof of the fact of granting any particular licence, the only use, which it could be allowed to answer, being by way of memorandum, to refresh the memory of the person who made the entries, when he should be called as a witness."

Degree of secondary evidence.

Examined copies, and the parol evidence of witnesses, are the ordinary and regular proof of the contents of lost writings. But when a written paper has been traced into the possession of one of the parties to the suit, who does not produce it after receiving a notice, something less than an examined copy may reasonably be admitted as sufficient, at least to oblige the party to give better evidence by producing the paper itself, if he finds the secondary evidence incorrect. Where it appeared that the defendant had acknowledged the receipt of a letter of a particular date, which was not produced at the trial when required, it was ruled, that an entry in a letter-book, (purporting to be a copy of a letter of the same date from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with great punctuality,) was admissible evidence of the contents of the letter in question. (1) "The rules of evidence," said Lord Ellenborough, "must expand according to the exigences of society: this entry is reasonable evidence to prove the contents of the letter of the particular date, which the defendant acknowledges he received, and which he does not produce upon a notice for that purpose: we know, it is the habit of merchants to keep such a book, and a witness has sworn, that the book in question was kept with great punctuality: if the entry in the clerk's handwriting were not admitted, there would be no way, in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. I will therefore

(1) *Pritt v. Fairclough*, 3 Camp. 305, by Lord Ellenborough. See also *Roberts v. Bradshaw*, 1 Stark. N. P. C. 28. In Lord Melville's case, (29 Howell's St. Tr. 734, 740), an entry of a power of attor-

ney, in the office-books at the Exchequer, was adjudged to be evidence of the contents of the power, after reasonable proof of the loss of the original. *Vide supra*, p. 453.

allow," added Lord Ellenborough, "the entry to be read as *prima facie* evidence, and the defendant may rebut it by producing the original."

The case of *Bullen v. Michel*, (1), affords an example respecting the admissibility of secondary evidence of ancient documents. In that case, on an issue to try, whether a particular farm in the parish of S. was discharged of tithes on payment of a modus, the Court of Exchequer determined, that an old ledger or chartulary of the abbey of Glastonbury was admissible, as secondary evidence of the endowment of the vicarage. Two questions arose, one, with respect to the custody, from which this document was produced, which will be afterwards mentioned; the other, (supposing it to have been sufficiently authenticated as to the propriety of its custody,) whether it could be admitted in evidence between the parties to the issue, the vicar and the occupiers of the farm. With respect to this it appeared, that the chartulary contained an account of matters of a miscellaneous description; among other things, it contained entries, which appeared to be transcripts of contemporaneous documents considered as authentic; and these transcripts purported to give an account of the licence of appropriation of the parish, and likewise an account of the several matters of endowment. The original endowment not being in the places where search had been made for it as its natural places of deposit, the Court held that the chartulary, which had been found in the custody of the Marquis of Bath, and which must, therefore, be considered as having come from the custody of the rector, (for the abbot was formerly the rector,) was admissible evidence. (2) The plaintiff appealed from this judgment to the House of Lords, who affirmed the judgment of the Court of Exchequer. Lord Redesdale, in giving his opinion on that occasion, stated, (3) "that the original instruments, if they could have been produced, would have stood on the same ground as the taxation of Pope Nicholas, in-

Secondary evidence of ancient writing.

(1) 2 Price, 399. Judgment affirmed in the House of Lords, 4 Dow. 298. *Wolley v. Brownhill*, 13 Price, 507, 508.

(2) Wood, B., differed from the rest of the Court on this point. And see 13 Price, 508.

(3) 4 Dow. 324; 2 Price, 399.

quisitions on the writ of *ad quod damnum*, and a variety of similar evidence, from which the jury may draw their inference. The only question then is, whether the entries in this book are evidence of these two instruments. If the originals could be produced, these entries would not be evidence. But search has been made, and the originals cannot be found; and if we shut our eyes to that sort of inferior evidence in cases where no other can be had, we shall constantly do injustice. The best evidence is often lost through carelessness, the injuries of time, and various other circumstances; and secondary evidence is then admitted, to raise presumption or inference, where no direct evidence can be had. This then is the next best evidence; and perhaps evidence still more inferior might have been admitted, if this could not have been produced. This, however, appears to be the best, after the originals. For these two instruments seem to have been copied by a person employed for the purpose, probably one of the monks, and deposited among the muniments of the abbey, because it was important for the interests of the abbey, that the instruments should be preserved; and for the same reason it might be presumed, that they were faithful copies; at least there appeared to have existed no motive to make them otherwise, and they were found in a situation where they were likely to be kept."

Copy of enrolment of deed.

There has been some difference of opinion on the subject of the admissibility of examined copies of the enrolment of a deed. The Chief Baron Gilbert makes the following distinctions on this subject: "Where a deed needs enrolment," he says, (as deeds of bargain and sale, by statute 27 Henry 8, c. 16,) "there the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deeds by enrolment, is also empowered to take care of the fairness and legality of such deeds, and therefore a copy of such enrolment must be sufficient; for when the law has appointed them to be made public acts, the copy of such public acts shall be a sufficient attestation." (1) "But where a deed needs no enrolment, (con-

(1) *Gilb. Ev.* 86. *Baikie v. Chandless*, 3 Camp. 21. *Garrick v. Williams*, 3 Taunt. 544. *Taylor v. Jones*, 1 *Ld. Raym.* 746; 1 *Keb.* 117; 1 *Salk.* 280.

tinues Chief Baron Gilbert,) there, though it be enrolled, the *inspeximus* of such enrolment is not evidence, because, since the officer has no authority to enrol them, such enrolment cannot make them public acts, and consequently cannot entitle the copy of them to be given in evidence; for then, if the deed were doubtful, it were but to enrol it, and bring the copy or *inspeximus* in evidence, and thereby avoid producing a deed that was any way suspicious." (1)

Mr. Justice Buller, after citing the rule from Chief Baron Gilbert, (that deeds of bargain and sale, enrolled and requiring enrolment, may be given in evidence without proof of the execution,) observes, (2) that "the law may well be doubted, notwithstanding that such deeds of bargain and sale enrolled have frequently in trials at *nisi prius* been given in evidence without being proved. In support of this practice," he adds, "the case of *Smartle v. Williams*, (3) is much relied on; but that case is wrong reported, for it appears from the report in Levintz, (4) that the acknowledgment was by the bargainor, and so it is stated in Salkeld's manuscript; besides, it appears from both the books, that it was only a term that passed, and consequently it was not an enrolment within the statute." Mr. Justice Buller then cites a case from Styles's Reports, (5) where Glyn, C. J., is reported to have said, that, "if divers persons seal a deed, and but one of them acknowledge the deed, and the deed is thereupon enrolled, this is a good enrolment, and may be given in evidence at a trial, as a deed enrolled. But it would be of very mischievous consequence," observes Mr. Justice Buller, "to say, therefore, that a deed, enrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land, without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by statute 10 Anne, c. 18. On the other hand, it seems as absurd to say, that a release, which has been enrolled upon the acknowledgment of the releasor, shall not be admitted in evidence against him, without being

(1) Gilb. Ev. 87; 1 Keb. 117.

(2) Bull. N. P. 256.

(3) 1 Salk. 280.

(4) 3 Lev. 387, S. C.

(5) Thurler v. Madison, Styl. 462.

proved to be executed, because such release does not need enrolment: and in fact such deeds have often been admitted: and that was the case of *Smartle v. Williams*; the deed there did not need enrolment, yet, being enrolled on the acknowledgment of the bargainor, it was read against him without "being proved."

Bargain and
sale of term.

In the case of *Smartle v. Williams*, above mentioned, an examined copy of the enrolment of a deed of bargain and sale, by which a term of years was assigned, was offered in evidence without any proof of the bargainor's sealing and delivery. It was objected, that the copy of the deed enrolled was not evidence, because the interest assigned, being only a term, passed immediately, and the enrolment afterwards is no more than an enrolment of an obligation: but the Court overruled this objection, and held, that "the acknowledgment of the deed by the lessor before the Master in Chancery is good evidence against himself, and against all who claim under him." (1) So in the case of *Lady Holcroft v. Smith*, (2) a distinction was made between deeds of bargain and sale (enrolled in pursuance of the statute of Henry 8), and other deeds enrolled, and it was held, that a copy of a deed, enrolled for safe custody, would not be evidence otherwise than against the party who sealed it, and all claiming under him. It does not appear from any of the authorities cited by the Chief Baron Gilbert, (excepting the case of *Smartle v. Williams*), against what party the copy of the enrolment was offered in evidence. If the enrolment had been on the acknowledgment of the bargainor, and offered as evidence against him, there cannot be a doubt of it's being admissible.

Bargain and
sale of free-
hold.

With regard to a copy of the enrolment of a deed of bargain and sale, indented and enrolled in pursuance of the statute of Henry 8, it is enacted by statute 10 Anne, c. 18, s. 3, (3) " (which was passed for supplying a failure in pleading or deriving title to lands, &c. conveyed by such deeds of bargain and

(1) 3 Lev. 387. Com. Dig. tit. Evidence (B. 1).

(2) 2 Freeman, 259.

(3) See also stat. 8 G. 2, c. 6,

s. 22, concerning deeds of bargain and sale of lands, in the North Riding of Yorkshire.

sale, where the original indentures are wanting, as often happens, especially where divers lands, &c. are comprised in the same indenture, and afterwards derived to different persons,) that, where any such indenture of bargain and sale enrolled shall be pleaded with a profert, the party so pleading may show forth and produce a copy of the enrolment; and such copy, examined with the enrolment, and signed by the proper officer, having the custody of the enrolment, and proved upon oath to be a true copy, shall be of the same force and effect as the indenture of bargain and sale would be, if produced." Before this statute, an enrolment of the deed could not have been pleaded; and though a deed had been exemplified under the great seal, yet it was necessary, at common law, to show forth the deed itself under seal, and not the exemplification. (1) So, by the common law, the king's letters patent themselves must have been shown forth in Court, and a *constat* or *inspeximus* of them was not admissible; but by stat. 3 & 4 Ed. 6, c. 4, explained by stat. 13 Eliz. c. 6, "patentees, and persons claiming under them, may make title in pleading by showing forth an exemplification of the enrolment of the letters patent, as if the letters patent themselves were pleaded and shown forth;" and now they are to be given in evidence, in the same manner as if they were pleaded. (2)

The rule concerning copies of enrolments appears then to be that an examined copy of the enrolment of a bargain and sale of freehold in lands, pursuant to the statute of Henry 8, is as good evidence as an examined copy of the original itself; and where the original is wanting, (as where it has been lost or destroyed, or where different parcels of land are comprised in the same indenture and afterwards derived to different persons,) (3) a copy of the enrolment signed by the proper officer, who has the custody of the enrolment, and proved by oath to be a true copy, will have the same force and effect as the original itself would have, if produced. (4) But a copy of the enrolment of a bargain and sale of a chattel interest, or of any

(1) Co. Litt. 225, b.

10 Anne, c. 18.

(2) *Olive v. Gwyn*, Hardr. 119.

(4) St. 10 Anne, c. 18, s. 3; 14

(3) See preamble of section 3,

East, 231; 1 Schoal. & Lefr. 207.

other deed enrolled for safe custody, is not admissible in evidence, except as against the party acknowledging the deed, or persons claiming under him; and against such party, and against all claiming under him, an examined copy of the enrolment of any deed is admissible, and equivalent to an examined copy of the original deed. (1)

Lastly, on the proof of handwriting, sealing, delivery, and publication.

Proof of handwriting.

The most obvious proof of handwriting, is the testimony of a witness who saw the paper or signature actually written. But whether such proof be attainable or not, other evidence of handwriting equal in degree, though generally inferior in point of weight and credit, is admissible, the nature of which evidence has occasioned much discussion in Westminster Hall.

Degree of certainty.

As to the degree of certainty which is expected from a witness when speaking to the identity of handwriting, he is not required, if he did not see the paper or signature actually written, to do more than express a belief on the subject. His evidence in such a case is the result of a process of reasoning, and any greater certainty than that which amounts to belief is not to be attained. The degree of confidence, with which a witness may be enabled to draw a conclusion as to the identity of handwriting, will vary according

Belief.

(1) The enrolment of a bargain and sale under the statute of Henry the Eighth is a record; the date of the enrolment is a material part of the fact of the record, and proof, or an averment, of a different date is not admissible. (The King in aid of Reed v. Hopper, 3 Price, 495, 511.) An examined copy of the memorial of an assignment of a judgment (the memorial being required by act of parliament), is evidence of the fact of the assignment: and the attested copy of the memorial of the registry of a deed

is evidence of the fact of registry. (Hobhouse v. Hamilton, 1 Schoal. & Lefr. 207.) An examined copy of the enrolment of the memorial of an annuity-deed is evidence of the contents of the original memorial, against a defendant, who prepared and carried the memorial to be enrolled. (Baikie v. Chandless, 3 Camp. 20. Action against an attorney for negligence in respect to a memorial of annuity.) See further, as to various kinds of secondary evidence, Pooley v. Goodwin, 4 A. & E. 94.

to the number and importance of the data, on which his conclusion is founded. He may entertain a strong or a weak belief. Witnesses will frequently express the weaker degrees of belief operating on their minds, by saying that they are of opinion, or they think, that a writing produced is the handwriting of a particular individual. It seems, that the evidence of a witness, who says he thinks a paper is in the handwriting of a particular person, is receivable. (1) The language, which a witness adopts in such cases, varies according to the habits of the individual; one person is over cautious, another is rash in drawing conclusions. Besides, the terms applicable to different degrees of conviction, which arise from deductions of reasoning, are not often used with great precision, even by persons of superior education, much less by ordinary witnesses.

Opinion.

With respect to the grounds, which are considered to be a legitimate data for a witness's belief in handwring, in cases where he has not seen the paper or signature written, it is to be observed, that the questions upon this subject have peculiar reference to the trial by jury. The belief of the witness is founded on a comparison of writings in all such cases. But still the circumstances, under which the comparison has been made, may be attended with such a liability to error, or fraud,—they may have such a tendency to subject parties to surprise, or may lead to so many collateral issues,—that it may be deemed expedient to exclude them from being the foundation of evidence offered to a jury. If, in general cases, by the rules laid down, a less amount of inconvenience and injustice

Grounds of belief.

(1) See *Garrels v. Alexander*, 4 Esp. 37, where the witness had seen another write once, and, from having seen him write once, *thought* that the signature was that person's handwriting: this evidence was admitted by Lord Kenyon. This case was recognised by Lord Wynford at *nisi prius*. Lord Eldon questioned it's authority, because the witness would not go so far as to express any

belief, *Eagleton v. Coventry*, 8 Ves. 473; see 12 Howell, 307. Lord Eldon allows, that it frequently occurred that a witness was pressed too much to speak to his belief. A witness will frequently answer directly, that he will not swear he believes a paper *not* to be a person's handwriting, and, upon being pressed, will speak positively to it

is produced by the failure of evidence, than of benefit by preventing juries from being distracted or misled, and by inducing parties to come prepared with the best evidence in their power, it is no solid objection that the evidence which is excluded might, in extreme cases, be more satisfactory to every mind than that which is receivable. The benefit, however, of restrictive rules upon the subject of evidence ought to be very apparent, as their most obvious effect is to shut out testimony, which, if it could be properly examined, must, in general, be conducive to the ends of justice. Besides, every restrictive rule is attended with the serious evil of rendering the law more technical, inaccessible, and uncertain.

Party seen to write.

It is clearly established, that a witness is allowed to give evidence to a jury of his belief in the identity of particular handwriting, when that belief is founded on his having seen the person write, whose handwriting is in dispute, even though he has only seen him write once, and then merely signing his surname. (1) This foundation for belief in handwriting is entitled to various degrees of credit. Whether, in the strongest instances, it be entitled to greater credit than other means of comparison, may be questionable; but, in extreme cases, it may afford as weak an inference as can possibly be drawn upon the subject.

Acquaintance with correspondence.

A witness is allowed to give evidence as to handwriting, when his belief is founded on the circumstance of his having seen letters or other documents purporting to be the hand-

(1) *Garrells v. Alexander*, 4 Esp. 37, where the witness had seen the party write once. See *Lewis v. Sapio*, M. & M. 39, reversing *Powell v. Ford*, 2 Stark. 164, in which Lord Ellenborough held, that a witness was not competent to prove the full signature of a person, from having seen him write his surname, and the initials of his Christian name. In *De la Motte's case*, 21 Howell, 810, a witness was

allowed to speak to *De la Motte's* handwriting, who had only seen him write twice. A witness is allowed to speak as to the identity of a person's mark, from having seen it affixed by him on several occasions, *George v. Surrey*, M. & M. 516. In *Francia's case*, 15 Howell, 923, a witness had seen the prisoner write for an hour, and had read over what he had written, which was a confession.

writing of the party, on the contents of which he afterwards communicated personally with the party, or when he has acted upon them by written answers producing further correspondence, or where the party has acquiesced in some matter to which they relate, or where the witness has transacted with the party some business to which they relate, or where the party and the witness have had some other mode of communication, which, in the ordinary transactions of life, would induce a reasonable presumption, that the letters or documents were the handwriting of the party. (1) With respect to the necessity of the correspondence being *acted upon*, it is not implied that any business must be transacted, or any act done in consequence of it. (2) And it should seem that letters forming one side of a correspondence may enable others, besides the party to whom they are addressed, to speak to the handwriting contained in them. As observed by Lord Denman, C. J., in *Doe v. Suckermore*, (3) "the clerk who read the letters, or the broker who was consulted upon them, is as competent to judge, whether a signature is that of the writer of the letters, as the merchant to whom they are addressed. The servant, who has habitually carried his master's letters, has an opportunity of obtaining a knowledge of his master's writing, though he never saw him write, or received a letter from him." Where a witness's belief is founded on acquaintance with handwriting by any of the above means, the evidence will be admissible, though such acquaintance has been confined to a single specimen; nor is there any limit of time defined by the law, within which the handwriting, which is the foundation of the witness's belief, must have been seen by him. (4)

Writings acted
on.

Witness ad-
dressed.

(1) Per Patteson, J., in *Doe v. Suckermore*, 1 Nev. & P. 46, citing Lord Ferrers v. Shirley, B. N. P. 236. *Carey v. Pitt*, Peake's Add. cases, 130. *Thorpe v. Gisburne*, 2 C. & P. 21.

(2) Per Williams, J., in *Doe v. Suckermore*, 1 Nev. & P. 43, citing the authority of Holroyd, J., see *Doe v. Wallinger*, Manning's Index, 131, where the witness had seen letters of the party in answer

to letters written by the witness, but had never done any act in consequence of the receipt of those letters.

(3) 1 Nev. & P. 54.

(4) In *Burr v. Harper*, Holt's N. P. C. 420, the witness' belief was founded on a single specimen, and he was unable to speak to the handwriting, without refreshing his memory at the trial. In *Eagleton v. Kingston*, 8 Ves. 467,

Identity of
writer.

Where a witness gives evidence of the handwriting of a party whom he has never seen write, the jury must be satisfied that the party, whose handwriting is in dispute, is identified as the person with whose handwriting the witness is acquainted. Thus, to prove the handwriting of a member of parliament, the opinion of a clerk employed to inspect franks has been held insufficient, although the clerk has never had occasion to apply to the member to verify his handwriting. (1) Upon an indictment for sending a threatening letter, tried before Lord Lyndhurst on the Midland Circuit, a postmaster gave evidence, that newspapers had been regularly sent through his office directed to the prisoner's son, who resided in Jamaica; and that, on one occasion, the prisoner called upon him to inquire about an overcharge of postage for one of these newspapers, and that he had said, he should write to Sir F. Freeling upon the subject; and that Sir F. Freeling afterwards sent to the postmaster a letter on the subject, purporting to be written by the prisoner: Lord Lyndhurst rejected the evidence, on the ground, that the prisoner had not been sufficiently identified with the person who wrote the directions on the newspapers, or the letter purporting to have been written by the prisoner. The identity, however, may be proved by other persons besides the witness, who gives evidence of the handwriting. In a case, where the witness had never seen the party whose handwriting he proved, it was held sufficient evidence of identity, that the party lived in the town from which the letters purported to have been written, and that no other person of the same name lived there. (2)

Refreshing
memory

A witness who has had sufficient means for enabling him to give evidence respecting a person's handwriting, and yet does not retain any distinct impression upon the subject, may be

Lord Eldon says, that a witness may be called to speak to handwriting, who has not seen the party write for twenty years, and that in *Horne Tooke's* case, Woodfall, who proved his handwriting, had not seen him write for a great length of time.

(1) *Batchelor v. Sir J. Honeywood*, 2 Esp. 714. *Carey v. Pitt*, Peake's Ev. App. 14. See *Randolph v. Goode*, 5 Pr. 312. *Lord Ferrars v. Shirley*, Fitz. 195.

(2) *Harrington v. Fry*, R. & M. 90.

allowed to refresh his memory, at the time of giving his evidence, by looking at a paper from which he has formed his opinion, and which he has kept in his possession, and may then declare his opinion as to the genuineness of the paper in question. (1) In such a case, not only is there no direct comparison by juxta-position of writings; but there is little or no danger of an unfair selection of specimens, for they must be confined to such as the witness has become acquainted with in other ways than for the purpose of giving evidence in the cause; the general character of the handwriting has been acquired incidentally and unintentionally; and the question appears to be, whether the evidence of the witness as to the general character of the handwriting is likely to be more satisfactory, when, perhaps, he trusts to a fleeting impression, which, for want of retouching has become faint and indistinct, or after he has had an opportunity of restoring his original impressions by an inspection of the papers from which they were derived. (2)

(1) *Burr v. Harper*, Holt's N. P. C. 420. In *Doe v. Suckermore*, 1 Nev. & P. 51, Patteson, J., said, that in *Burr v. Harper*, comparison of handwriting was received; that the decision was never brought under review, and that he did not think it correct. See Lyster's case, 16 Howell, 196, in the examination of the witness Doyley. The case of *Filliter v. Minchin*, in Manning's Index, 131, seems contrary. There seems to be no distinction as to the liberty of using a paper for the purpose of refreshing a witness's recollection, concerning handwriting between the case where he has seen the party write, and where he has acquired a knowledge of handwriting by other means, see per Williams, J., referring to *Burr v. Harper* and *Doe v. Suckermore*; in *Burr v. Harper* the witness had seen the party sign the paper which he had in his possession. Mr. J. Williams, in *Doe v. Suckermore*, observes, that the case of *Burr v. Harper* is an authority, up to the extent of the observations in the text, if not beyond them. In that case, al-

though Dallas, Ch. J. said, that the perusal of the specimen was to refresh the memory, and not *merely* for the purpose of comparison, yet the witness compared in Court the signature in dispute with that which was in his possession; he did not merely compare the signature in dispute with the standard in his own mind as revived. The distinction is, indeed, too refined to be of much service in ordinary practice; but it should seem, that the witness should put by the document with which he refreshes his memory, before he is shewn the disputed handwriting, and should compare that writing only with such a standard as existed in his mind before his memory was refreshed.

(2) It should seem, that although the witness had formed his opinion from various documents, he might refresh his memory by the inspection of one of them. For he must speak as to the general character of the handwriting which he has derived from all the papers he has seen, and he may be asked, on cross-examination, whether the

Upon the trial of an indictment at Nottingham, against a servant of the Duke of Portland for sending a threatening letter, the Duke's steward spoke to having received accounts from the prisoner, which he handed over to the comptroller; the comptroller, from his knowledge of the prisoner's handwriting, acquired by means of inspecting these accounts, swore to his belief, that the prisoner wrote the threatening letter. He was allowed to refresh his memory, by inspecting the accounts in the witness-box.

Imitated handwriting.

It seems that the evidence of a witness, who upon the inspection of handwriting states his belief that it is forged, having from his habits acquired the requisite experience and skill, is strictly admissible, although he is not acquainted with the handwriting supposed to be imitated. But various Judges have concurred in considering that little or no weight is due to testimony of this description. (1) It may be observed, the Courts are de-

inspection of one of several papers revives in his mind an impression of such a general character, or only creates an impression derived from the particular specimen.

(1) Per Denman, Ch. J., in *Doe v. Suckermore*, 1 Nev. & P. 63, who said, "that neither Court nor jury would place reliance on such an opinion, and that, practically, this chapter might be expunged from the books of evidence." Such evidence, by inspectors of franks, clerks of the post-office, and other persons of skill, has been admitted. See *Goodtitle d. Revett v. Braham*, 4 T. R. 497, a trial at bar, where a clerk to the post-office, accustomed to inspect franks, was allowed to be examined, to prove that certain handwriting was in an imitated, and not a natural hand, and that two writings suspected to be in imitated hands were written by the same person. The case was compared to those, in which evidence of a decypherer, and scientific evidence as to Wells Harbour, was admitted; those cases, however, may perhaps be regarded as distinguishable.

The witness admitted, that his mode of detecting imitations was by observing whether the letters were painted, and that, in the case of writings by old people, this was a very fallible criterion. In *Carey v. Pitt*, Peake's Add. cases, 130, Lord Kenyon refused to receive similar evidence from an inspector of franks, saying, that although the evidence had been received in *Revett v. Braham*, yet that he had laid no stress upon it to the jury. In *Rex v. Cator*, 4 Esp. 117, 145, an inspector was admitted to swear that a libel was in a disguised hand, but he was not allowed to give his opinion, whether, upon comparison of the libel with another writing, they both appeared to him to be written by the same person. In *Gurney v. Langlands*, 5 B. & A. 330, Wood, B., rejected similar evidence, and a new trial, moved for on that ground, was refused. Part of the Court thought the evidence inadmissible; part, that if admissible, it was not entitled to any weight. See *Kemp v. Mackrill*, Sayer, 132. *Stranger v. Searle*, 1 Esp. 14.

cidedly of opinion, that evidence of this description ought to have no influence upon juries, and that the reception of it is calculated to occasion great uncertainty in the administration of justice (1)

On the subject of comparison of handwriting, which has occupied the attention of the Courts on numerous occasions, it seems agreed, that a witness will not be allowed to give to a jury the result of an inference, as to a piece of handwriting being that of a particular individual, where that inference is made, for the purposes of the issue, from comparing the writing in question with another specimen of writing by the same individual. (2)

Comparison of handwriting.

Direct comparison not allowed.

The reasons assigned for this rule are, that the specimens selected may have been garbled and fallacious, and may not exhibit a fair specimen of the general character of the handwriting; and, secondly, that this species of evidence may lead to numerous collateral issues, and may often come, without notice and by surprise, against the party to be affected by it. For the genuineness of each specimen produced, by way of testing the specimen pertinent to the issue, may become a distinct subject of litigation, dependent on the same species of testimony. Another reason, less satisfactory, has been frequently given, namely, that if a jury were unable to read, they would be incompetent to institute a comparison of handwriting. And it has

Reasons for excluding comparison.

(1) Lord Eldon, in *Eagleton v. Kingston*, 8 Ves. 467, says, that Mr. Justice Buller first introduced this species of evidence.

(2) See the observations upon this subject by the Judges, in *Doe v. Suckermore*, 1 Nev. & P. 54. Per Dallas, Ch. J., in *Burr v. Harper*, Holt's N. P. C. 420. *Stranger v. Searle*, 1 Esp. 14. *Clermont v. Tullidge*, 4 C. & P. 1. *Greaves v. Hunter*, 2 C. & P. 477. It was considered by the Judges, in *Doe v. Suckermore*, that if comparison of handwriting was not admissible absolutely, it could not be received

in confirmation, though an attempt was made by counsel to reconcile the authorities by this distinction. The case of *Allesbrook v. Roach*, 1 Esp. 351, in which Lord Kenyon received direct evidence of handwriting, by means of collateral documents, seems to be overruled. A witness may speak to handwriting from some particular characteristic, as a close observance of the rules respecting capital letters. See *Da Costa v. Pym*, Peake's Add. cases, 144, handwriting of Mr Mickle, author of the *Lusiad*.

been thought that, although the general character of handwriting, of which a witness has formed a standard in his own mind, may be safely relied upon, yet that the manner in which a writer has formed letters, in particular instances, does not afford a proper criterion by which the minds of a jury should be influenced. (1)

It may be thought, that the abuse, arising from an unfair selection of specimens, would seldom be practised, or, if practised, would be subject to detection, and liable to the consequences of exposure. The probability of a jury not being able to read, is, in the present day, somewhat remote; it seems to afford no reason, why a witness should not explain to them the result of his comparisons; indeed the possibility of a jurymen not being able to read or write might afford some ground for calling a witness to make a comparison, which, in the case of ordinary modern writings, he could, if he were able to read and write, as well make for himself. This objection, also, seems to militate with the doctrine to be presently noticed, that a jury may compare handwriting. The creating of collateral issues is, doubtless, a serious inconvenience, and this circumstance raises a question of expediency, whether the obviating such an inconvenience is purchased too dearly or not, by excluding one of the means for the discovery of truth. It does not seem relevant to inquire, which is the best test of genuineness,—a close and accurate comparison of the formation of particular letters, and of the manner of writing particular words,—or a comparison founded, generally, on a greater number of instances, and attended with fewer circumstances of suspicion, but, at the same time, more indistinct, and not so subject to the test of strict examination. It seems difficult to contend, that the former mode of comparison, if considered abstractedly, ought to be excluded from Courts of Justice. In discussions relative to these points, it is obviously unfair to cite extreme instances;

(1) See the observations of the Judges upon this subject, in *Doe v. Suckermore*, 1 Nev. & P. 54, as to the objection that a jury might not be able to read. Per Lord

Eldon, in *Eagleton v. Kingston*, 8 Ves. 467. Per Dallas, Ch. J., in *Burr v. Harper*, Holt's N. P. C. 420. Per Lord Kenyon, in *Macferson v. Thoytes*, Peake, 20.

but it ought to be considered, that all testimony concerning handwriting, even when attended with every circumstance likely to remove suspicion, is a very fallacious species of evidence. (1)

Within a recent period, a rule has been established, which amounts to a considerable relaxation of the strictness of the law, in regard to the direct comparison of handwriting. It is this, that a jury, upon a question respecting the identity of handwriting, may take other papers already in evidence, and compare them with that which is in dispute, for the purpose of coming to a conclusion, from the comparison, whether the disputed handwriting is genuine. (2)

Jury may compare.

The principle on which this rule is founded, has been stated to be, that the jury having the documents before their eyes, and being obliged to look at them for another purpose, it is impossible to prevent their forming some opinion with respect to their being like or unlike the disputed writing; and, consequently, when the minds of the jury must be so employed, it is better

(1) Contradictory evidence is not essential to repel the proof of handwriting, per Lord Eldon, in *Eagleton v. Kingston*, 8 Ves. 467. See *ib.*, an anecdote respecting a mistake as to Lord Eldon's own handwriting. An anecdote relating to the same subject is mentioned by Mr. Peckham, in his speech upon *De la Motte's* trial. Many similar anecdotes of mistakes in handwriting will occur to the legal reader. The speech of Mr. Peckham, and that of Mr. Adam, for Mr. Justice Johnson, 29 Howell, 475, contain many valuable remarks upon the subject of handwriting. See *ib.* an experiment, whether another person could not write like the defendant. Many useful remarks upon the subject are to be collected from the arguments in *Bishop Atterbury's* case, 16 Howell, where reference is made to the writers on the civil law, in treating upon handwriting. In the same case, there is much curious matter

as to the forging of seals, and of figures in cypher, and as to the evidence of clerks in the post-office. The point is there noticed, whether a witness speaking from a correspondence should produce the letters, upon which his judgment is formed. See also some remarkable cases upon handwriting in the *causes celebres*. It should seem to be more difficult to prove genuine handwriting, or to detect it when disguised, than to disprove it when wrongly imputed, on account of the more difficult access to the requisite witnesses. Where forgery is imputed in making an instrument, which is the subject of an action, a Judge's order may be obtained for the inspection of it by witnesses.

(2) *Griffith v. Williams*, 1 Cr. & J. 47. *Doe v. Newton*, 1 Nev. & P. 4. See the observations of the Judges, in *Doe v. Suckermore*, 1 Nev. & P. 32. *Solita v. Yarrow*, 1 Mo. & R. 133.

for the Court to enter into the same examination, and to suggest any observations that may occur as to the value of such evidence. (1) It may be remarked that, from the constitution of the human mind, a jury might be expected to feel some gratification of curiosity, in the discovery of minute coincidences in handwriting, and that this feeling might often mislead them, even where the coincidences were fanciful or accidental.

Writings must
be relevant.

But it is an established qualification of the last-mentioned rule, that documents, irrelevant to the issues on the record, are not to be received in evidence at the trial, in order to enable a jury to institute such a comparison. (2) The principle which has been above stated, as that on which a jury are allowed to compare handwritings, does not extend to the admission of documents irrelevant to the cause. Such as are connected with the cause must be proved to be genuine, for the purpose of determining the matters in controversy. A greater extension of the rule would have the effect of raising a number of issues altogether collateral to the cause, with this additional objection, that one of the parties to the suit cannot

(1) See the observations of the Judges, in *Doe v. Newton*, 1 Nev. & P. 5, and in *Doe v. Suckermore*, 1 Nev. & P. 36. In *Griffith v. Williams*, Bolland, B., pointed out several remarkable coincidences in the formation of handwriting.

(2) Per Patteson, J., in *Doe v. Suckermore*, 1 Nev. & P. 49. His Lordship adds, "much less can it be permitted to introduce writings, in order to enable a witness to institute such a comparison. Doe d. *Perry v. Newton*, 1 Nev. & P. 1, which is an express decision upon the point. It was said by the Court, that the case of *Griffith v. Williams*, 1 Cr. & J. 47, was limited to the instance of documents already in evidence in the cause, which were necessarily therefore before the eyes of the jury. The decision in *Griffith v. Williams* is so explained by Bolland, B., in *Rex v. Morgan*, 1 M. & Rob. 134, n. It seems that *Allesbrook v. Roach*, 1 Esp. 351, in which Lord Kenyon

allowed the signature of a defendant to several bills of exchange to be compared by the jury with his alleged signature to the bill on which that action was brought, is overruled. See the observations of the Court in *Doe v. Newton*, and *Doe v. Suckermore*. It should appear from the trial of the *Seven Bishops*, 4 St. Tr. 342, that a practice formerly prevailed at *nisi prius* similar to Lord Kenyon's ruling in *Allesbrook v. Roach*. In *Doe v. Newton*, two decisions at the Gloucester assizes were cited, in which the rule upon this subject was laid down in the same manner as in that case. See also *Bromage v. Rice*, 7 C. & P. 548. *Waddington v. Cousins*, 7 C. & P. 596. *Allport v. Meek*, 4 C. & P. 267, where the drawer's name was admitted by the acceptance, and *Tindal, Ch. J.*, would not allow it to be left to the jury to compare the drawer's name with the same name in the first indorsement.

know what documents are about to be produced, and cannot therefore come prepared to answer inferences arising from their production. (1)

It is clearly established, that where the antiquity of a writing, purporting to bear a person's signature, makes it impossible for a witness to swear that he has ever seen the party write, it is sufficient that the witness should have become acquainted with his manner of signing his name, by inspecting other ancient writings which bear the same signature, provided these ancient writings have been treated and regularly preserved as authentic documents. (2) A witness may, therefore, be regularly asked, whether he has inspected such ancient writings, in order to acquire a knowledge of the character of the handwriting: and, then, whether he believes the writing in question to be of the same character. (3)

Ancient writings.

It seems, also, that it is regular to lay ancient writings before

(1) See per Coleridge, J., in *Doe v. Newton*, 1 Nev. & P. 7.

(2) Several instances occurred of the admission of this kind of evidence in the case of *Beer and Ward*, on the trial of an issue out of Chancery in C. P. sitt. after Mich. T. 1821, before Dallas, C. J., and, on a second trial, before Lord Tenterden in K. B. sitt. after Trin. T. 1823. Holroyd, J., also admitted such evidence in the case of *Doe d. Maddock v. Lyne*, Leic. Sum. Ass. 1822. See also *Brune v. Rawlings*, 7 East, 282; *Morewood v. Wood*, 14 East, 328; *Gould v. Jones*, 1 W. Bl. 384; *Doe v. Tarver*, R. & M. 143, evidence of this description was rejected in *Brookbard v. Woodley*, Peake 21, n. It's admissibility was recognised by the Judges in *Doe v. Suckermore*. No particular period of antiquity has been assigned for the introduction of evidence of this description. In *Brune v. Rawlings*, 7 East, 282, the supposed writer had been dead about sixty years. It should seem, that the evidence was admissible, wherever, in the opinion

of the Judges, there was a reasonable difficulty in procuring better proof from the circumstance of antiquity. Though a certain degree of antiquity may be essential for the admission of the evidence, probably a greater or less period would be thought sufficient in different cases, according to the numerous circumstances which affect the facility of proof in a greater degree than mere length of time, at least within the period of sixty years.

(3) "Whether by studying the assumed handwriting, the witness should have acquired a knowledge of the handwriting, and then apply himself to the writing to be proved, or whether an actual comparison may be made does not seem clear. Mr. Justice Holroyd was of the former opinion. Lord Tenterden and Mr. Justice Lawrence received evidence of the latter kind." Per Williams, J., in *Doe v. Suckermore*, 1 Nev. & P. 41. The practice adopted by Holroyd, J., is stated in a MS. case in Stark. Ev. 375; *Sparrow v. Farrant*, Devon. Spr. Ass. 1819.

a witness at the time of the trial, in the first instance, for the purpose of his inspection, and, after a comparison made in Court by the witness between those writings and the writing produced for the purpose of the issue, to inquire as to his judgment and belief. (1)

In such cases of the comparison of ancient writings, the rule, at least where a comparison is made in Court, is different from that which prevails as to modern writings. This difference is founded principally on the necessity of the case, or more properly on the consideration, that the inconvenience, which must arise from excluding evidence, would operate so universally as to preponderate over the mischief to be apprehended from distracting the attention of juries, being, in some cases, distracted, and their judgments misled. It is also to be observed, that the evidence of ancient handwriting, in different ages, is a matter of science, upon which juries require the assistance of scientific witnesses; and the opinion of a witness is founded in such cases upon safer grounds than the mere similarity of particular letters. (2)

(1) See *Doe v. Tarver*, R. & M. 143, where Lord Tenterden directed a person, who produced a paper bearing a signature, to compare it with other signatures of the same steward, in books belonging to the manor; observing, that he remembered Lawrence, J., directing a Mr. Price, who was accidentally present at a trial, to compare a certain ancient writing with others purporting to be written by the same person. In *Brune v. Rawlings*, 7 East, 282, similar evidence was received by Le Blanc, J., the writer having been dead about sixty years. In *Morewood v. Wood*, 14 East, 328, it does not precisely appear, whether the comparison was made by a witness or by the jury. In none of the cases was any objection made to the mode, in which the witness instituted his comparison, nor is the mode of comparison noticed in the reports with much particularity. It was observed by Lord Denman, C. J., in *Doe v. Suckermore*, that it is not

quite clear, that, in fact, the mode prescribed by Holroyd, J., was not adopted by Lord Tenterden, Mr. Justice Lawrence and Mr. Justice Le Blanc, and the comparison made with the idea in the mind of the witness, and not with the paper itself.

(2) It should seem that Mr. Price, the witness in whose hands Lawrence, J., placed the ancient writings as reported in *Doe v. Tarver*, was the officer of a Court of Justice, and that a witness for this purpose ought to be conversant with handwriting; per Lord Denman, C. J., in *Doe v. Suckermore*. "In ancient documents it often becomes a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it being materially assisted by antiquarian researches. This may have naturally assisted in opening the way for the admission of this evidence, even in cases where skill of that particular kind is not necessary." Per Coleridge,

Some questions have arisen, whether, consistently with the above rules, a witness may speak to handwriting, not from a direct comparison, but from a standard in his own mind, where that standard has been obtained purposely with a view to the particular cause. In the case of *Stranger v. Searle*, (1) a witness had seen the alleged writer of a disputed signature write several times, but, on his adding, that this was when the defendant had written his name for the purpose of shewing the witness his manner of writing, Lord Kenyon rejected the evidence, on the ground, that the defendant might write differently from his common mode of writing, through design. But where a witness formed his opinion of the handwriting of a person, from having observed it signed to an affidavit used in the cause, upon a motion to postpone the trial, it was held sufficient. (2) Here the writing was not made expressly with a view to the evidence, though probably the attorney might have made himself acquainted with it for the purposes of the trial.

Standard of
handwriting
purposely
acquired.

A recent case has occurred upon this subject, in which the opinions of the Court of King's Bench were equally divided. The facts of the case were as follows.—In an action of ejectment, the lessor of the plaintiff claimed as heir at law, and the defendant as devisee under the will of the person last seised. The will under which the defendant claimed, was admitted to bear the signature of the deceased, but it was alleged that the signatures of the attesting witnesses were forgeries. These witnesses were all called, and they stated the attestation to be in their handwriting. One of the attesting witnesses, admitted, on cross-examination, that the signatures to two depositions produced by the officer of the Ecclesiastical Court with the will attached to it, and made in a suit in the Ecclesiastical

Doe v. Suckermore.

J., in *Doe v. Suckermore*. This species of evidence is to a certain extent open to the objection, that the specimens may be unfairly selected. Per Coleridge, J., in *Doe v. Newton*, 1 Nev. & P. 6; per Bolland, J., *Rex v. Morgan*, 1 M. & Ro. 134, n. Where a question arose at *visi prius*, from the obscurity of handwriting, what the words of an instrument produced in evi-

dence were, Lord Chief Justice Denman decided the point himself, and refused to have it put to the jury, *Remon v. Hayward*, 2 A. & E. 666.

(1) 1 Esp. 14, see this case commented on by Lord Denman, C. J., in *Doe v. Suckermore*, 1 Nev. & P. 56.

(2) *Smith v. Sainsbury*, 5 C. & P. 196.

Court, were in his handwriting ; he also admitted that eighteen detached signatures of his name, which were produced in Court, were in his handwriting. On the part of the plaintiff, an inspector of powers of attorney at the Bank was called, who stated it to be his duty to compare the signatures to powers of attorney with former signatures made by the parties. He stated, that he had never seen the attesting witness write, the specimens of whose signatures were produced. It was proposed to put the depositions into his hands, that he might say, in looking at the signature to the will and depositions, whether they were in the same handwriting. This evidence was rejected. The witness was then asked, whether he was acquainted with the handwriting of the attesting witness ? To which he answered, that he had seen, before the trial, the signatures to the dispositions, and the specimens which had been produced in Court, and he thought, from his former examinations of those specimens and depositions, that he knew the attesting witness' handwriting. He was then asked, whether he believed the signature of the attesting witness to the will to be written by him. This question was overruled. He was then asked, whether, on looking at the signature to the will, he believed it to be a genuine or an imitated character of handwriting ? He replied, that, according to his belief it was an imitation. This evidence was received.

The principles on which the first piece of evidence was rejected, and on which the last was received, have been before considered. With regard to the admissibility of the second piece of evidence, it was argued, that there is an essential difference between casting the eye at the same moment on two objects placed before it, in order to judge of their resemblance, and the process of requiring familiarity with a certain character of handwriting, in order to judge afterwards, whether a document bears that character ; (1) that the rule, which rejects evidence of the former description, does not exclude the latter kind ; and that the knowledge of handwriting obtained by cor-

(1) Different opinions have been entertained as to which of these two processes affords the most satisfactory means of judging concerning

handwriting. See per Lord Denman, Ch. J., in *Doe v. Suckermore*, 1 Nev. & P. 58.

respondence is of the same nature as that which is acquired from inspecting writings with an express view to a trial, and therefore, that if the one kind of evidence be received, the other ought to be also.

On the other hand, it was objected, that the proof of the specimens selected for the purpose of comparison would in the generality of cases lead to inconvenient collateral issues; (for the general rule can not be made to depend on the accidental occurrence of the handwriting to the selected specimens being acknowledged;) that the party, against whom the selected specimens are used, would not be prepared to meet evidence of this description; that the general character of a person's handwriting, which a witness has acquired incidentally, and unintentionally, under no circumstances of bias or suspicion, is much more satisfactory than the most elaborate comparison of even an experienced person, called by the one side or the other with a particular object: for these reasons, that the Courts would be justified in admitting the former species of evidence, and excluding the latter.

With respect to the history of the practice of Courts of Justice concerning the proof of handwriting, it may be observed, that in this, as in most other cases of evidence, the rules have been settled in very modern times. Comparison of handwriting, in it's most objectionable form, seems to have been continually resorted to at *nisi prius*. Whilst, on the other hand, the comparisons of handwriting, which are now constantly admitted, were thought to be inadmissible, at least upon criminal trials. The practice, for the jury to compare writings, and for the Judge in his charge to comment upon the materials of such comparison, seems to have originated within living memory, if not in the present day.

History of
proof concern-
ing hand-
writing.

On the trial of Algernon Sydney, as appears from the printed report of that case, (1) three witnesses were called to prove a paper to be his handwriting; the first said, he had seen the

Sydney's case.

(1) 3 St. Tr. 302; 8 Howell St. Tr. 467. S. C.

prisoner write the indorsement upon several bills of exchange, and that he believed the paper to have been written by him ; this evidence was objected to as a comparison of handwriting, but admitted : the second witness said, he had not seen the prisoner write more than once, but that he had seen his indorsement upon bills, and that the paper was very like it : the third witness said, he had seen several notes, which had come to him with the indorsement of the prisoner's name, and that he had paid them, and he had never been called to account for mispayment : the whole of this evidence was received. The prisoner, in his defence, still insisted, that nothing but the comparison of handwriting had been offered, as proof against him ; and the act of parliament, which reversed his attainder, states the admission of this evidence as one of the grounds of the illegality of his conviction. That act recites, among other particulars, that "there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet, supposed to be his handwriting, which was not proved by any one witness to have been written by him ; *but the jury was directed to believe it, by comparing it with other writings of his.*" (1) However, if the printed report of the trial is correct, something more than the mere comparison of handwriting was laid before the jury ; for, according to that report, the first witness had seen the prisoner write his name several times. And though it may be objected to the testimony of the two last witnesses, that the indorsements mentioned by them, were not sufficiently proved to have been written by the prisoner that objection will not apply to the other witness, whose evidence was certainly admissible. The same kind of evidence was admitted in Lord Preston's case within a year after the reversal of Sydney's attainder, and has been since received in many cases of great authority. (2)

*Ferrers v.
Shirley.*

The first reported case, in which the admissibility of proof

(1) Cited in Layer's case, 6 St. Tr. 279.

(2) See observations on the act for reversing Algernon Sydney's attainder by Lord Denman, C. J.,

in Doe v. Suckermore, 1 Nev. & P. 58. That the printed report of the trial was altered by Jeffreys, see 9 St. Tr. 865, n.

of handwriting founded on a written correspondence, appears to have been decided, is the case of *Lord Ferrers v. Shirley*. (1) Upon a feigned issue out of Chancery, directed to be tried at bar, whether a deed, pretended to have been executed by the Earl Ferrers in the year 1683, was his deed or not, several witnesses were called to swear to the handwriting of the subscribing witnesses then dead, and amongst others one J. J., who would have sworn to the name of J. Cottington, whose name was on the deed as a witness, because he had seen several letters written by Cottington : whereupon he was asked, whether he had ever seen Cottington write ? to which he answered, that he never had, nor ever saw the person that wrote the said letters, but that his master (to whom the letters were written for the rent of a part of the estate of the late Earl Ferrers, which his said master held,) informed him, they were the letters of Cottington, the Lord Ferrers' steward, who was the person pretended to have attested the deed in question. His testimony was hereupon objected to, because he could not say with any certainty whether or not the writer of the letters was the same person that attested the deed ; for Cottington, who was supposed to write the letters, might have got some other person to write those very letters for him ; and the counsel insisted, that in all cases where a witness would swear to handwriting, he must be able to say, that he saw such a person write. The Court rejected the witness, because he could not ascertain the identity of the person. But Lord Raymond said, " It was not necessary in all cases, that the witness should have seen the person write, to whose hand he swears ; for where there has been a fixed correspondence by letters, and it can be made out, that the party writing such letters is the same man that attested a deed, that will entitle a witness to swear to that person's hand, though he never saw him write." Page J., said, " If a subscribing witness to a deed lives in the West Indies, whose handwriting is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person. written by him to his correspondent in England, because, under the special circumstances of that case, there is no other way, or

(1) Fitzg. 195.

at least the difficulty will be great, to prove the handwriting of such subscribing witness." But Lord Raymond differed, and said, "that these special circumstances could not vary the reason of the thing." It was further objected to the same witness, that he should produce the letters, that the Court and the jury might be able to judge of the resemblance between the handwriting of the letters and that on the deed; but this was over-ruled by the Court, "because the witness might well have acquired a knowledge of the character of Cottington's handwriting, by having seen several letters written by him." The rule to be deduced from this case is, that a witness may be admitted to speak to a person's handwriting, if he has seen letters, which can be proved to have been written by him; but that this antecedent proof of the identity of the person is indispensably necessary, and further, that hearsay evidence of identity is totally inadmissible. The case, reported to have been put by Page J., is not very clearly stated. If it is understood to mean, that, where a subscribing witness resides abroad, slighter proof of his signature may be given than is necessary in other cases, it certainly cannot be supported; but if the meaning is, that his signature may be proved in the same manner as if he were dead, by a witness who has seen letters proved to be of his writing, the case is warranted by many later authorities, which have been already mentioned. And with regard to the last objection, namely, that the witness ought to produce the letters, that the jury might judge of the resemblance, it appears to have been made as a preliminary objection to the admissibility of his evidence, and was therefore properly over-ruled. But after the witness has been regularly admitted to give his evidence, it seems reasonable, that the opposite party should be allowed not only to cross-examine as to the number and appearance of the writings, which the witness professes to have seen, but also to call upon him to produce the writings in Court, that the jury may judge of the means which the witness had of forming his opinion.

Seven bishops'
case.

This rule of evidence appears not to have been settled at the time of the memorable trial of the seven bishops, who were tried for a libel in the fourth year of James II. In the course

of that trial, a witness, called to prove the signature of one of the bishops, said he had received letters from him on business, and that he had done what the letters required, and that he believed the signature in question to be the bishop's handwriting, but could not swear that those letters were written by him. (1) This was the strongest evidence in the case, excepting the proof of the archbishop's signature, which was proved by one who had seen him write. But Mr. Justice Powell thought it an objection to the evidence before mentioned, that the witness had never seen the bishop write, and that the receipt of the letters was not sufficient, unless he could also swear who had written them. A long and desultory argument ensued on the admissibility of the paper in question, the counsel for the prosecution insisting that the signatures of the bishops had been proved, and the counsel on the other side, that the proof was insufficient. Mr. Justice Powell said, (2) "he thought the paper had not been sufficiently proved to be subscribed by the bishops. It is too slender a proof for such a case. I grant you," he added, "in civil actions a slender proof is sufficient to make out a man's hand, as by a letter to a tradesman or a correspondent, or the like; but in criminal cases, such as this, if such a proof is allowed, where is the safety of your life, or any man's life here?" The Judges were equally divided in opinion, and the paper was not allowed to be read. Thus it appears, that at that time the rule of evidence, which has been mentioned, was not admitted in criminal cases, though even then it was acknowledged to be reasonable in cases of a civil nature. But this distinction is no longer made. If the rule is true in the one case, it must be equally true in the other; for the rules of evidence, which are the laws of truth, must be uniform and universal. (3)

(1) 4 St. Tr. 338.

(2) P. 345

(3) See the criminal trials in which this species of evidence has

been received. Cases of Lord Preston, Francia, Laver, Dr. Hensey, De la Motte, in the State Trials.

CHAPTER V.

OF THE ADMISSIBILITY OF PAROL EVIDENCE TO CONSTRUCT,
ADD TO, VARY, OR DISCHARGE WRITTEN INSTRUMENTS.

THE order in which it is proposed to treat of this intricate and extensive subject, is ; first, to consider in what cases parol evidence is admissible to assist in the construction of written instruments ; secondly, in what cases it is admissible to add to, vary, or discharge written instruments.

SECTION I.

*Of the Admissibility of Parol Evidence to assist in the
Construction of Written Instruments.***Ambiguities.**

The first section treats of ambiguities latent and patent, of the admissibility of evidence to explain the meaning of a word used in a writing, or to show that a meaning ought to be assigned to words differing from their ordinary acceptation, and, lastly, of usage as explanatory of ancient grants and other deeds.

It is an inflexible rule, that, whatever evidence may be called in aid by a Court of Law to assist it in its judgment, the only purpose for which it can be admitted, is to enable the Court to determine, what is the instrument itself. (1) This rule expresses, in other language, the general rule of law, that parol

(1) *Vide Doe d. Gwillim v. Gwillim*, 5 B. & Adol. 129. It is scarcely necessary to observe, that the question under discussion relates only to the mode of ascertaining the operation of a written

instrument; the question of the operation of parol evidence, in conjunction with a written instrument, where by law it may have an effect independent of it falls within the second section.

evidence cannot be admitted to contradict, or vary the terms of a written instrument. And it naturally leads to the rule laid down in the well known maxim commented on by Lord Bacon, (1) distinguishing the classes of difficulties which arise in the construction of written instruments, and determining to which of them parol elucidatory evidence may be applied. *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.*

There are two kinds of ambiguities, says the commentator, one is called *ambiguitas latens*, the other *ambiguitas patens*. The first occurs where the deed or instrument appears upon the face of it certain and free from ambiguity, but the ambiguity is introduced by evidence of something extrinsic, or by some collateral matter out of the instrument; the latter kind is such as appears on the face of the instrument itself.

With respect to the first, namely, the latent ambiguity, as it is raised by extrinsic evidence, so it may be removed in the same manner; and parol evidence, admitted for that purpose, does not vary or contradict the written instrument, but determines merely to what set of facts it applies. Such evidence must necessarily be admissible to some extent, to determine the application of every written instrument. Parol evidence must be received to shew, what it is that corresponds with the description, and, the admissibility of such evidence to that extent being conceded, it follows, that with the same object, where it becomes doubtful to which of several subjects the instrument applies,—from the circumstance that parol evidence shews they are all comprised within the description in the instrument,—it would go but one step further, and would not vary or add to the writing, to give parol evidence of other extrinsic facts which determine the application of the instrument to one fact rather than to the others.

Latent ambiguity.

If a person grant his manor of S. to one and his heirs, so far there appears to be no ambiguity; but if it should be

(1) *Reg.* 23.

proved, that the grantor has the manors both of South S. and North S., this ambiguity is matter in fact, and parol evidence may be admitted to shew to which of the two manors the deed applied.

In this instance the difficulty is introduced by evidence that there is more than one subject to which the terms of the written instrument are applicable, and a long series of cases have established the rule, that the difficulty or ambiguity, which is thus introduced, may be removed by the production of further evidence upon the same subject. (1) It was said in *Lord Cheyney's* case, (2) that if a man have two sons both baptized by the name of John, and conceiving that the elder, who had been long absent, is dead, devises his lands by his will in writing to his son John generally, and in truth the elder is living, the younger son may, in pleading, or in evidence, allege the devise to him; and if it be devised he may produce witnesses to prove his father's *intent*, (3) that he thought the other to be dead, or that he at the time of the will made, meant his son John the younger. "No inconvenience," adds Lord Coke, "can arise, if an averment in such a case be taken in case of a devise by will; he who sees such will, whereby land is devised to his son John, cannot be deceived by any such invisible averment, for when he sees the devise to his son John, he ought at his peril to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent; and if no direct proof can be made of his *intent*, then the devise is void for the uncertainty." (4)

(1) *Miller v. Travers*, 8 Bing. 244.

(2) 5 Rep. 68, b.

(3) See observations on the admissibility of evidence of intention, *post*.

(4) For other examples of latent ambiguities, arising from an apparent applicability of the writing to more than one subject, see *Bro. Abr. Nosme*, 63. *Lane v. Cowper*, Moore, 104. *Pacy v. Knollis*, 1 Brown. 132. *Anon. Keilway*, 49. (a) *Altham's case*, 8 Rep. 155. *Coun-*

den v. Clarke, Hob. 32. *Lepiot v. Brown*, 1 Salk. 7. *Dowset v. Sweet*, Ambl. 175. *Jones v. Newman*, 1 Bl. 60. *Careless v. Careless*, 1 Mer. 384. *S. C.* 19 Ves. 604. *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57. *Doe d. Morgan v. Morgan*, 1 C. & M. 235. *Richardson v. Watson*, 4 B. & Ad. 787. *S. C.* 1 Nev. & M. 575. See also *Doe d. Thomas v. Thomas*, 6 T. R. 671. *Miller v. Travers*, 8 Bing. 248.

A second class of cases, and of some difficulty, arises, where, upon applying the written instrument, it appears that with relation to the subject matter, to which it appears to apply, the description in it is true in part, but not true in every particular. Such cases are within the rule, *falsa demonstratio non nocet*; so much of the description as is false is rejected, and the instrument will take effect, if a description remain sufficient to ascertain the application of the instrument: (1) as where an estate is devised, called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate. (2)

In the case of *Sehwood v. Mildmay*, (3) the testator devised to his wife part of his stock in the four per cent. annuities of the Bank of England, and it was shewn by parol evidence that at the time he made his will, he had no stock in the four per cent. annuities, but that he had had some which he had sold out, and had invested the produce in long annuities. It was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the long annuities, it was held, that such stock should pass rather than the will be altogether inoperative. The case of *Goodtitle v. Southern*, (4) falls more closely within the same principle. A devise was "of all that my farm called Trogues' Farm, now in the occupation of A. C.:" upon looking out for the farm devised, it was found that part of the lands, which constituted Trogues' Farm, were in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of "Trogues' Farm," and that the inaccurate part of the devise might be rejected as surplusage.

The case of *Day v. Trigg*, (5) ranges itself precisely in the

(1) See note (1) *infra*, 715.

(2) *Miller v. Travers*, 8 Bing. 248.

(3) 3 Ves. jun. 306. See the remarks on this case, in *Miller v.*

Travers.

(4) *Demise of Radford*, 1 M. & S. 299.

(5) 1 P. Wms. 286.

Erroneous
description.

same class. The devise was of "all the testator's freehold houses in Aldersgate Street," when in fact he had no freehold, but had leasehold houses: this was held to be in substance and effect a devise of his houses there, and as there were no *freehold* houses there, so as to satisfy the description, the word "freehold" ought rather to be rejected than the will be totally void.

These cases follow the rule laid down by Anderson, C. J. (1) "An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator." (2)

Numerous other cases, illustrating this doctrine, are to be found in the books. In a recent case (3) there was a lease of "all that part of the park called or known by the name of Blenheim, or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of one R. S., lying in a direct line across the said park from a gate erected, &c., (setting out the abutments), together with the farm-houses, and other houses, &c. belonging or appertaining to the said premises, and which are now in the occupation of the said R. S." It was held, (4) that land passed under the lease, which was comprised within the description by the abutments, but which was not in the occupation of R. S. (5)

The rule governing the admission of evidence, in cases of erroneous description, already has been remarked, requires, that when the erroneous description, the *falsa demonstratio*, has

(1) Godbolt's case, 14 . p. 131.

(2) Upon the doctrine of inaccurate description, see 2 Roll. Abr. 52, tit. Grant, P. 14 Vin. Abr. 87, Grant, Q. Doddington's case, 2 Rep. 33. Door v. Geary, 1 Ves. sen. 255. Hampshire v. Pierce, 2 Ves. sen. 216. Bradwin v. Harpur, Ambl. 374. Parsons v. Parsons, 1 Ves. sen. 265. Dobson v. Waterman, 3 Ves. 308, n. Druce v. Davison, 6 Ves. 82. Penticost v. Lee, 2 Jac. & W. 207. Evans v. Tripp, 6 Mad. 91. Doe d. Chevalier v. Huthwaite, 3 B. & Ald. 632.

Doe d. Gore v. Langton, 2 B. & Adol. 680.

(3) Doe d. Smith and others v. Galloway, 5 B. & Ad. 43.

(4) See the judgment of Parke, J., in this case, cited *infra*, p. 715, n.(1). See also the judgments of Little-dale, J. and Parke, J., in Doe d. Ashforth v. Bower, 3 B. & Ad. 459.

(5) R. S. was lessee of all the park, and it was contended that the evidence showed a virtual occupation by R. S., but the judgment did not proceed on this ground.

been rejected, a sufficient description should remain, so as to ascertain the application of the written instrument; (1) and therefore it seems, that where a description is in every respect erroneous, the instrument cannot take effect. In applying this rule, however, the distinction must be observed between evidence to shew what the instrument describes, (2) and evidence to shew what the party to the instrument intended to describe. Supposing that, with all the light which can be thrown upon the instrument by evidence as to the meaning of the description, there appears to be no person or thing answering in any respect to the description, it seems that, to admit evidence of a different description being intended to be used by the writer, would be to admit evidence for the substitution of one person or thing for another, in violation of the rule, which lays down that an averment is not good to increase that which is defective. (3)

It appears to be difficult to reconcile the case of *Beaumont v. Fell*, (4) with this doctrine. A testator bequeathed a legacy to Catherine Earnley; no person bearing that name appeared to claim

Beaumont v. Fell.

(1) "When the rule for a new trial was moved for, I alluded to the maxim, *falsa demonstratio non nocet*, but in doing so, I wished that the sense of that maxim should be attended to; I have always understood that such *falsa demonstratio* should be superadded to that which was sufficiently certain before; there must *constat de persona*, and if to that an inapt description be added, though false, it will not avoid the devise." Per Lord Kenyon, 6 T. R. 676. In the judgment in *Miller v. Travers*, 8 Bing. p. 248, it is said, that where the description is imperfect or inaccurate, parol evidence is admissible, "provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."—"The rule is clearly settled, that where there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if premises be described in general terms, and a particular

description be added, the latter controls the former." Per Parke, J., in *Doe d. Smith v. Galloway*, 5 B. & Ad. 51. This rule exactly agrees with that laid down by Hobart, Ch. J., (Hob. 171.) "But in grants of particulars sufficiently once ascertained, another mistaking will not frustrate, though it be false." The same learned Judge says of a distinction which has been taken in some cases between the erroneous part following, and preceding the true, "indeed, in one sentence it is vain to imagine one part before another, for though words can neither be spoken, nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence."

(2) See the observations on evidence of intention, *infra*.

(3) Laid down by Anderson, Ch. J., in *Godbolt*, 131, and adopted by Tindal, Ch. J., and Lord Lyndhurst, in *Miller v. Travers*, 8 Bing.

(4) 2 P. Wms. 141; 2 Eq. Ca. Abr. 366, pl. 8.

it; parol evidence was admitted to shew that Gertrude Yardley was the person meant, and the decree of the Master of the Rolls established the will in her favour. It was stated (1) by his Honor, in giving judgment, (2) as a devise in which neither the Christian nor surname was right, nor any addition of certainty to help it. The parol evidence received was "that the testator's voice, when he made his will, was very low and hardly intelligible; that the testator usually called the legatee Gatty, which the scrivener, who took instructions for drawing the will, might easily mistake for Katty, and that the said scrivener not well understanding who his legatee of the 500*l.* was, or what was her name, the testator directed him to J. S. and his wife to inform him further, who afterwards declared that Gertrude Yardley was the person intended." It appears in the judgment, that the Master of the Rolls further relied upon evidence that the testator had often "declared he would do well for her." The learned Judge, in giving judgment, said, "It is true, if this had been a grant, nay, had been a devise of land, it had been void by reason of the mistake both of the Christian and surname;" and in another part of the judgment, "and by the common law as well as by the statute, the devise of land ought to be in writing; and there had been no writing to entitle Gertrude Yardley, had this been a devise of land."

(1) 2 P. Wms. 142. The case of *Hodgson v. Hodgson*, 2 Meriv. 593, may, it seems, be considered a case of inaccurate description. Robert Hodgson devised several closes to the defendant, paying 100*l.* he owed to J. S., and 100*l.* he owed by bond to one Shaw. "It fell out that the 100*l.* due on bond was not due to Shaw, but was the money of Alice Beck, then the wife of one Fitch. By reason of this mistake, the devisees of the land refused to pay the 100*l.*" The report goes on to state, that the plaintiffs examined Harvey, who drew the will, and another witness, to shew what debt due on bond was meant. A decree was made in favour of the plaintiffs, first at the Rolls, and afterwards on a bill of review by Lord Cowper; and it is further

stated in the report, that the Lord Chancellor "declared he saw no hurt in admitting of collateral proof to make certain the person, or thing described." The Lord Chancellor seems to have considered that the description, 100*l.* due on bond, was sufficient, and that the misdescription of the creditor was immaterial. It appears that it was ordered by the decree, (2 Vern. 593, 3rd edit.) that the plaintiffs should give a bond to indemnify the defendant's estate against any other bond made by the testator either to Shaw or any other person.

(2) From the mode in which this case is reported, it is not very easy to distinguish between the arguments of counsel, and the judgment; but it should seem that the latter begins at the words, "It is true," &c.

In the case of *Whitbread v. May*, (1) where the testator, having devised all his estates in trust for his son for life with remainder over in strict settlement, &c., by a codicil afterwards revoked his will "so far as it related to *his estate at Lushill* in the county of Wilts, and *Hearne* and Buckland in the county of Kent, which he devised to his son in fee," it appeared, that at the time of the devise the testator had lands in the parish of *Hearne* and in several other parishes, all which he had purchased by one contract from one person; evidence was then offered to show, that the testator, by the description of his "*estate at Hearne*" meant to designate and include not only the lands in that parish, but also all the other lands, which he had purchased at the same time. This evidence was received at the trial, subject to the opinion of the Court above: and the Court of Common Pleas were afterwards equally divided in opinion, on the question of it's admissibility.

In a much later case, however, the case of *Doe* on the demise of *Sir A. Chichester v. Oxenden*, (2) which was very similar to the last, the Court of Common Pleas adjudged such evidence to be inadmissible. The question there was, whether on a devise of the testator's "*estate of Ashton*," parol evidence could be admitted to show, that the testator intended by that description to devise all his maternal estate, which consisted of two manors in the parish of Ashton and another manor in the adjoining parish; the Court of Common Pleas, after hearing two arguments, determined against it's admissibility.

Soon after this decision of the Court of Common Pleas, the devisee brought an action of ejectment against the heir at law, and offered at the trial the evidence before mentioned; on the rejection of which, a bill of exceptions was tendered; and the case was brought up to the House of Lords on a writ of error. (3) The question on the admissibility of the evidence was referred

(1) 2 Bos. & Pull. 593.

(2) 3 Taunt. 147. *Doe d. Brown v. Greening*, 3 Maule & Selw. 171. *Beaumont v. Field*, 1 Barn. & Ald.

247.

(3) *Doe d. Oxenden v. Sir A. Chichester*, 4 Dow. 65.

to the Judges: and Lord Chief Justice Gibbs delivered their unanimous opinion, that the evidence ought not to be admitted.

In the case of *Thomas v. Thomas*, (1) where the testator had devised to his granddaughter Mary Thomas, of Llechlloyd, in Merthyr parish, it appeared that, at the time of his death, he had a granddaughter of the name of Elinor Evans, one of the lessors of the plaintiff, who lived in the place and parish named in the will, and also a great-granddaughter, Mary Thomas, the defendant, the only person of that name in the family, but who lived in another place, and had never been in Merthyr parish; the plaintiff's counsel at the trial offered parol evidence to shew, that the person, who drew the will, had made a mistake in the name of the devisee; and Mr. Justice Lawrence received the evidence, (2) subject to the opinion of the Court above on its admissibility; but as the jury were of opinion, that the name had not been inserted by mistake, and therefore found for the defendant on the first count, which laid the demise from Elinor Evans, the admissibility of this evidence did not afterwards form any part of the argument. After this finding of the jury, the question was between Mary Thomas and the plaintiff on a demise from the heir at law, and in this stage of the cause the defendant's counsel offered evidence of declarations made by the devisor previous to the making of his will, expressive of his regard for the plaintiff, and of his intention of giving her the premises in dispute. But this evidence was rejected, on the ground that nothing *dehors* the will could be received, to shew the intention of the testator (which could only be collected from the words of the will itself), after the removal of any latent ambiguity in the description of persons or other terms in the will. And this opinion was afterwards affirmed by the Court of King's Bench. "If there had been no person," said Lord Kenyon, "to answer the description of granddaughter, living at Llechlloyd, in Mer-

(1) 6 T. R. 671. And see Lord Walpole v. Lord Cholmondeley, 7 T. R. 138. and Hampshire v. Pierce, 2 Ves. 216, cited by Lawrence, J., 6 T. R. 678.

(2) See 8 Vin. Ab. 312, pl. 29;

thyr parish, I should have rejected the description, and have said, that the devise applied to Mary Thomas; but it appears that there is another person answering to that part of the description, who is also in another part of the will an object of the testator's bounty. Then, as there are two parts of the description not answering to Mary Thomas, who is named in this clause of the will, we are left to conjecture who was meant by the devisor; but the law will not allow an heir at law to be disinherited by conjecture. And with regard to the other question respecting the rejection of evidence," added Lord Kenyon, "it was properly rejected; the supposed declaration having been made by the testator, long before the will was made: but, had they been made at the time of making the will, I should have thought them admissible evidence."

In *Miller v. Travers*, (1) the testator devised "all his freehold and real estates whatsoever, situate in the county of Limerick and in the city of Limerick," to certain trustees named in his will. At the time of making his will, he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates in the county of Clare. It was not disputed, that the real estate in the city of Limerick passed under the devise, but the plaintiff contended that he was at liberty to shew, by parol evidence, that the testator intended his estates in Clare to pass under the same devise. The Vice Chancellor was of opinion, that such evidence was admissible, and ordered that the parties should proceed to a trial at law on an issue, whether the testator did devise his estates in the county of Clare, and in the county of Limerick, and in the city and county of the city of Limerick, or either, or which of them, to the trustees, &c. Against this decree the defendant appealed; and the Lord Chancellor requested the assistance of Tindal, C. J., and Lord Lyndhurst (then Lord Chief Baron) upon the hearing of the petition of the appeal. Tindal, C. J., delivered their joint judgment. After stating that the question between the parties was, whether parol

*Miller v.
Travers.*

(1) 8 Bing. 244.

Miller v.
Travers.

evidence was admissible, to shew the testator's intention, that his real estates in the county of Clare should pass by his will, (assuming for the purpose of argument, that, if parol evidence were admissible by law, the evidence tendered would be sufficient for establishing beyond contradiction the intention of the testator to include his estates in Clare in the devise to the trustees,) the Chief Justice defines the rule for the admission of parol evidence. "It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing, which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity, introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised, or who was the person really intended to take under the will; and this appears to be the extent of the maxim, *ambiguitas verborum latens verificatione suppletur*." The learned Judge then observes, that the cases, to which this construction applies, range themselves into two separate classes; first, where there is more than one estate or subject matter of devise, or more than one person whose description follows out and fills the words used in the will; secondly, where the description, contained in the will, of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. The judgment then proceeds:—"But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or indeed any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself. The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he has property in the city of Limerick, which answers to the

description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of the will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description. *Miller v. Travers.*

“The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of or in addition to that of Limerick. “But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

“Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule, which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words, which he has not used, cannot be added. *Denn v. Page.* (1)

“But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up

(1) 3 T. R. 87.

Miller v.
Travers.

the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the Statute of Frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority, to evince the intention of the testator, than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards, intended to be introduced by the Statute of Frauds, would be entirely destroyed, and the statute itself virtually repealed.

“ Upon examination of the decided cases, upon which the plaintiff has relied in argument, not one will be found to go the length of supporting the proposition which he contends for: on the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty, which arises from applying the description, contained in the will, either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

Lowe v. Lord
Huntingtower.

“ Thus, in the case of *Lowe v. Lord Huntingtower*, (1) in which it was held that evidence of collateral circumstances was admissible, (as of the ages of the several devisees named in the

(1) 4 Russ. Rep. 581, n.

will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will,) such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will, consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Rep. 155, '*stand well* with the words of the will.'

Miller v. Travers.

"The case of *Standen v. Standen*, (1) decides no more, than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But this proceeds upon the principle, that the will would be altogether imperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment.

Standen v. Standen.

"The case of *Mosley v. Massey and others*, (2) does not appear to bear upon the question now under consideration. After the parol evidence had established, that the local description of the two estates mentioned in the will had been transposed by mistake, (the county of Radnor having been applied to the estate in Monmouth, and *vice versa*,) the Court held that it was sufficiently to be collected, from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description: all, therefore, that was done, was to reject the local description, as unnecessary, and not to import any new description into the will."

Mosley v. Massey.

The cases before mentioned of *Selwood v. Mildmay*, (3) *Goodtitle v. Southern*, (4) and *Day v. Trigg*, (5) are then cited

(1) 2 Ves. jun. 589.

(4) 1 M. & S. 299.

(2) 8 East, 149.

(5) 1 P. Wms. 286.

(3) 3 Ves. jun. 306

*Miller v.
Travers.*

as ranging under the head *falsa demonstratio non nocet*, enough appearing "upon the will itself to shew the intention, after the false description is rejected." The Chief Justice proceeds: "But neither of these cases afford any authority in favour of the plaintiff; they decide only that, where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that any thing may be added to the will; thus following the rule laid down by Anderson, C. J., in Godb. Rep. 131:—'An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.'

Hunt v. Hort.

"On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator: as in *Hunt v. Hort*, (1) and in many other cases.

Blank in a will.

"Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare.

Doe v. Chichester.

In the case of *Doe d. Oxenden v. Chichester*, (2) it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of 'my estate of Ashton,' no parol evidence was admissible to shew that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The Chief Justice of the Common Pleas, in giving the judgment of the Judges in that case, says, 'If a

(1) 3 Bro. Ch. C. 311.

(2) 4 Dow. P. C. 65.

testator should devise his lands, of or in Devonshire or Somersetshire, it would be impossible to say, you ought to receive evidence that his intention was to devise lands out of those counties.' Lord Eldon, in the same case, had stated in substance the same opinion. The case so put by Lord Eldon and by the Chief Justice is the very case now under discussion.

"But the case of *Newburgh v. Newburgh*, decided in the House of Lords on the 16th of June 1825, appears to be in point with the present. In that case the appellant contended, that the omission of the word 'Gloucester' in the will of the late Lord Newburgh proceeded upon a mere mistake, and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein. "The question 'whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will,' was submitted to the Judges, and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument, that it could not.

*Newburgh v.
Newburgh.*

"As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the Vice Chancellor."

It is remarkable, that the case of *Beaumont v. Fell* is not the subject of direct comment in this judgment; it has, however,

acquired some increase of authority by the approval of it in other cases.

In *Thomas v. Thomas*, (1) Lord Kenyon said, "in addition to the cases that were cited, another in *Peere Williams* might have been referred to, where the name of the legatee was mistaken; the testator gave a legacy to Catherine, it turned out that there was a person whom he frequently called Gatty, and not according to her real name, which was Gertrude; and when parol evidence of it was received, it left no doubt that the testator meant Gatty." The other judges made no comment on this case. Soon after the decision of *Thomas v. Thomas*, Lord Kenyon again made *Beaumont v. Fell* the subject of comment. "Where extrinsic circumstances let in by parol testimony, explaining the situation of the testator's family and of the legatee's, introduce a doubt of the testator's intention, the same kind of evidence, that introduced the doubt, may be admitted to explain it. On that proceeded the case, that I mentioned on a late occasion, of *Beaumont v. Fell*, where a legacy was given by the will to Catherine Earnley, there being no such person in existence; there was no ambiguity on the face of the will, but the latent ambiguity was introduced by extrinsic evidence, and the same kind of evidence also shewed, that there was a person of the name of Gertrude, whom the testator called Gatty, which name the person who drew the will mistook for Katty; in that case, therefore, as parol evidence was admitted to shew the latent ambiguity, parol evidence was also admitted to explain it." It is perfectly clear, from the language of the observations made in these cases, that Lord Kenyon did not regard *Beaumont v. Fell* as ranging within the second class, referred to in the judgment in *Miller v. Travers*, of cases of description true in part and false in part; and, therefore, to meet that learned Judge's reasoning in support of it, it is not necessary to inquire, how far the judgment in *Miller v. Travers* overrules it, considered as a case of *falsa demonstratio*. The same view of it is taken by Sir James Mans-

(1) Cited, *supra*, 718.

field in *Doe v. Oxenden*, (1) "I need not particularize the cases of devises, where there were two persons of the same name, or where the name, by which property was devised, applied equally to two estates. (2) Such was the case in *Peere Williams*, of a devise to Gertrude Yardley, by the name of Catherine Earnley, where there was no such person as Catherine Earnley; and the case in *Ambler*, (3) of legacies to John and Benedict, sons of John Sweet; the testator had two sons, the name of one was Benedict, but the name of the other was James"—"It is not expressly said in any of these cases, that it was necessary to receive the evidence, in order to give effect to the will, which would not operate without such evidence. But although this is not said, yet the rule seems to hold. It will be found, that the will would have had no operation, unless the evidence had been received." The learned Judge afterwards says, "it is safer not to go beyond the line," of cases in which the will without the explanation would have no operation.

It is remarkable, that the authority of the case of *Beaumont v. Fell* has applied to a greater extent, than

(1) *Supra*, 717.

(2) It cannot be urged, that the distinction, between an inaccurate description and an ambiguity, was not present to the mind of the Judge; in argument, the position of Lord Hardwicke, in *Ulrich v. Lichfield*, 2 Atk. 372, was cited, "I do not know, that upon the construction of a will, courts of law or equity admit parol evidence, except in two cases, first, to ascertain the person, where there are two of the same name; or else, where there has been a mistake in the christian name, or surname. On this authority, Sir James Mansfield remarked, "that the rule here laid down was certainly too narrow; for in case the testator had possessed no estate at Ashton, the rule is, that from whatever cause the ambiguity proceeds,—whether from a misdescription of the estate, or

from a misdescription of the person, if there be a latent ambiguity,—the parol evidence is admissible." The rule laid down by Lord Hardwicke, with some slight verbal differences, is identical with that expressed in *Miller v. Travers*, and the circumstance is strong to show, that the view which Sir James Mansfield took, disapproving of Lord Hardwicke's ruling, is directly opposed to the judgment, in *Miller v. Travers*, and ought therefore to be considered as superseded by it. "Ambiguity, proceeding from misdescription," it must however be admitted, is not very precise language, nor does the use of it indicate, that the distinction between ambiguity and inaccuracy, was very strongly marked in the mind of the learned Judge.

(3) 175, *Dowset v. Sweet*.

the reasons, originally assigned for the decision, appear to warrant. The Master of the Rolls said, "It is true if this had been a grant, nay, had it been a devise of land, it had been void by reason of the mistake, both of the christian and surname;" and again, "By the common law, as well as by the statute, a devise of land ought to be in writing, and there would have been no writing to entitle Gertrude Yardley, had this been a devise of land. However, this being a bequest of a personal thing, a chattel interest, makes it a different case; and as originally a bequest of a legacy was governed by, and construed according to the rules of the civil and canon law, so shall it be after making the Statute of Frauds, provided there be a will in writing." So that it seems, in the judgment of the Master of the Rolls, parol evidence of a disposition of personalty has in itself an effect independent of the writing, provided there be a written indication generally of some disposition of it.

The authority of this case, so far from warranting the general admission of such evidence on a devise, is against the admissibility of it in the case of a devise or grant of land; [and the case is of no authority at all in case of a devise of a thing personal, unless the distinction taken is sound. The whole judgment professes to rest upon the distinction. Yet the cases in which Lord Kenyon and Sir James Mansfield cited it, were cases of devises of land. This distinction was probably the reason that *Beaumont v. Fell* was not cited, or commented on as an authority in point, in the judgment delivered by Tindal, C. J., in *Miller v. Travers*, which was also a devise of land.

*Beaumont v.
Fell.*

Treating the case of *Beaumont v. Fell* as a devise of land, what is there to distinguish it from that of *Miller v. Travers*? In the former, the testator in every particular misdescribed the devise intended; in the latter, he misdescribed the devised estate intended. (1) All the arguments in the judgment of *Miller v. Travers* seem to apply to it.

(1) It will not be argued, that there is any difference between a mistake in the description of the thing devised, and a mistake in the description of the devisee.

It is true, that in *Miller v. Travers*, a part of the devise, that of the estates in the city of Limerick, was capable of taking effect without admitting evidence to show what was meant by the devise of the lands in the county of Limerick; but it has been justly observed, (1) the devise of the lands in the county of Limerick was independent of that in the city of Limerick, and, where there are two distinct devises, the fact that one of them is satisfied, cannot furnish an argument for refusing to give effect to the other. (2)

Nothing seems to be more clear than the rule, that, in cases of erroneous description, it is a condition to the validity of the instrument, that upon rejecting the erroneous part, a "sufficient indication of intention must appear upon the face of the will;" but if in cases, where there is a description of a person or thing not in existence, parol evidence is admissible to shew that any other person or thing was intended, this rule is abrogated. (3) Cases in which, after rejecting the erroneous part, no sufficient indication of intention remains, are, before the

(1) Wigram on *Extrinsic Evid.*, 2d edit. p. 119.

(2) The evidence which, it seems, would be undoubtedly admissible in *Beaumont v. Fell*, would, in conjunction with the will itself, show that there was a devise to Catherine Earnley, that no such person appeared to be in existence, but that there was a claimant named Gertrude Yardley, whom the testator usually called Gatty. In this state of the case, the question would be, whether, upon the principle *falsa demonstratio non nocet*, the surname Earnley being rejected, the christian name, if correct, would be itself a sufficient indication of the devisee, and if so, whether Gatty satisfied that indication? Both these questions leave untouched the general question of the admissibility of evidence, to shew the process by which Gatty passed into Katty, and from Katty to Catherine. The objectionable evidence is that which shews, not what the name used describes, but what the name was which the tes-

tator intended to use. The argument founded on the mistake of Katty for Gatty, may be conclusive of the truth of the parol evidence, but it has nothing to do with the admissibility of it. But, as before observed, it is not as a case of *falsa demonstratio*, that *Beaumont v. Fell* is attempted to be supported. The writing must express the meaning of the testator: it makes no difference, whether the will be written by him, or by someone whose writing he adopts by signing it; and therefore the question is precisely the same, whether a mistake be made by the amanuensis employed or by himself. To show such a mistake made by the former may add to the value of the evidence, if admitted, but it cannot affect the question of its admissibility.

(3) The distinction is palpable between evidence of what the name used means, and evidence of what name the testator intended to use. See *infra*, 731, that the former evidence is in all cases admissible.

rejection of the erroneous part, in every respect the same as those where a person or thing not in existence is described, and to reject the description in the writing and to admit parol evidence would be contrary to the rule which requires an indication on the face of the instrument. (1) One of these rules then is wrong; but the rule, requiring an indication to remain on the face of the instrument, is that which is supported by the highest and latest authority; and therefore, it seems, the other must be considered as overruled.

Where an instrument uses a proper term as designating a person whom it is intended to affect, and no such person is to be found, that proper name is altogether insensible, and it seems that there is no distinction between such a case, and one in which an insensible word is used as designating any other subject matter to which the instrument relates, *ex. gr.* in a will, the thing devised; in the first case, the instrument is intended to point out some person,—in the second, some thing; but in both cases the word used, with all the assistance that evidence can give as to the meaning of the word, is incapable of conveying an intention. If this be so, the decision of Sir John Leach, on one point in *Goblet v. Beachey*, (2) cannot, it seems, be reconciled with *Beaumont v. Fell*. Nollekens, the sculptor, by a codicil to his will, desired that “all the marble in the yard, the tools in the shop, bankers, mod, (3) tools for carving,” (and certain other things,) should be the property of the plaintiff. Parol evidence of a female servant of the

(1) It cannot be said, in answer to this argument, that the rule as to *falsa demonstratio* applies only to cases where the erroneous part does describe some person or thing which is in existence. It was not so in the great majority of cases considered as falling within that class; it was not so in *Selwood v. Mildmay*, *Goodtitle v. Southern*, or *Day v. Trigg*; the cases cited in *Miller v. Travers*, as being within it.

(2) 3 Simon, 26. There is a fuller report in Mr. Wigram's Treatise on the *Admission of Extrinsic*

Evidence, from which it appears that the Vice-Chancellor said, “that he had found no authority which exactly governed the case; but that upon principle he was satisfied, that to admit the evidence of Mary Holt (the servant), respecting the testator's declaration, would be to repeal the Statute of Frauds.” The ultimate decision of the Vice-Chancellor, 2 Russ. & Mylne, 624, was reversed on appeal; but this point was not touched by the reversal.

(3) There was a small mark at the end of this word.

testator was tendered, who was the attesting witness to the codicil in question, that, before she subscribed her name, she read over the codicil in the presence and hearing of the testator, and that when she came to the word "mod," she asked the testator what he meant by it, and that he replied "models;" (1) Sir John Leach held, (2) that her evidence was clearly inadmissible. (3)

To ascertain whether a case presents latent ambiguity or erroneous description, a comparison must necessarily be instituted between the description in the instrument, and the subject matters which, it is contended, are sufficient, to satisfy it. (4) To do so with certainty, and to make the decision of the Judge, in expounding an instrument, independent of the

Evidence of
circumstances.

Sense of words
in instrument.

(1) In the report by Mr. Wigram, it appears that the servant further asked the testator, whether he meant the plaintiff to have the models? and he said, "Yes."

(2) 3 Simon, 26.

(3) A case somewhat similar to *Beaumont v. Fell* was decided before it, and by the same Judge, Sir Joseph Jekyll. In *Masters v. Masters*, 1 P. Wms. 421, a testatrix "gave to Mrs. Sawyer 200*l.*, when there was no such person ever known to her; but it was alleged she meant one Mrs. Swapper." It seems, however, from the report, that part of the will was written so blindly, seeming to have been altered, that it was difficult, if not impossible to read it. It rather appears, however, from the report, that the legacy to Mrs. Swapper was not in this part blindly written. A reference to the Master was ordered as to the legacy to Mrs. Sawyer, "to examine who the testatrix meant thereby, and whether the testatrix meant Mrs. Swapper, who was the person that contended for the same; and if the Master should find she was the person intended, then she was to receive her legacy in proportion to the other legatees." This case was cited in *Goblet v. Beechey*. In *Andrews v. Dobson*, 1 Cox, 425, "a

legacy of 500*l.* was given to James, son of Thomas Andrews, of Eastcheap, printer. There was no person of the name of Thomas Andrews, in Eastcheap, but there was James Andrews, a printer, who lived there; he had one son named Thomas by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The plaintiff, in this cause, was the son by the first wife, who claimed the legacy, insisting the testator meant "Thomas, the son of James," instead of "James, the son of Thomas;" and prayed some inquiry respecting these circumstances. But his Honour, Sir Lloyd Kenyon, said, "though there were cases in which legacies were left to persons by nick-names, and evidence had been admitted to show that the testator usually called them thereby, yet he thought this was beyond all precedent, and dismissed the bill." This case was also cited in *Goblet v. Beechey*.

(4) The Court may take such things into consideration as to put themselves in the place of the testator, and then to shew the terms of the will affect the property. By Parke, J., in *Doe d. Templeman v. Martin*, 1 N. & M. 524.

accidents of his greater or less knowledge of the sense of the words used by the writer, and of the facts to which they may be applicable, it is evidently necessary that parol evidence should be admitted, to shew what is the sense of the words used, and what are the facts to which they may be applicable. With this view, evidence must be admissible, of all the circumstances surrounding the author of the instrument.

In the simplest case that can be put, namely, that of an instrument appearing on the face of it to be perfectly intelligible, inquiry must be made for a subject matter, (1) to satisfy the description. - If in the description of an estate, it is designated as Blackacre, there must be evidence to shew what field it is that is known by that name. (2) When there is a devise of an estate purchased of A., or of a farm in the occupation of B., it must be shewn by extrinsic evidence, what estate it was that A. purchased, or what farm was in the occupation of B., before it can be known what is devised. (3)

It is evident that circumstances must determine, whether a particular person or thing can be comprehended within the terms of the description in a writing. By a will of a musical instrument maker, giving his household furniture, a piano-forte would, or would not pass, according to the circumstance of its being in his warehouse or in his dwelling-house. (4)

(1) By this term is here understood every thing to which the instrument relates, as well the person with, or to whom the deed or devise is made, as the thing which is devised, given, &c.

(2) By Coleridge, J., in *Doe v. Holtom*, 4 A. & E. 81, and see *Doe dem. Gore v. Langton*, 2 B. & Ad. 680, a case of construction dependant upon a view of the whole will.

(3) 1 Merivale, 653, by Sir W. Grant. Whether parcel or not is always matter of evidence, by Buller, J., 1 T. R. 701. R. acc. *Doe dem. Beach v. The Earl of Jersey*, 3 B. & C. 870.

(4) In *Le Farrant v. Spencer*, 1 Ves. Sen. 97, a captain of an East India ship devised "all his house-

hold furniture, linen, plate, and apparel whatsoever." The testator died possessed of plate, India, and dimity goods, and some rough diamonds. Lord Hardwicke directed a reference to the Master "to distinguish what goods he had for his own domestic use, and what for trade, or merchandize, without which," his Lordship said, "it was impossible to determine of the extent of the bequest." See also *Kelly v. Powlet*, Ambler, 610. *Pratt v. Jackson*, 1 Bro. P. C. 222. *Carr v. Carr*, 1 Mer. 541. In *Doe dem. Gore v. Langton*, 2 B. & Ad. 695, Lord Tenterden, in delivering the judgment of the Court, which decided that the words "belonging to" might be interpreted

Though it is now to be considered as settled, by the case of *Rose v. Bartlett*, (1) that a testator, having freehold and leasehold property in the same place, by a devise of his lands and tenements in that place, passes only his freehold lands, or by a devise of his messuages lands tenements and hereditaments in that place to uses applicable only to freehold property, (2) may, in general, be considered as intending to devise only his freehold property, yet a different construction may be put upon the will, and the leasehold will pass, if a different intention can be collected from the circumstance of the leasehold property being blended in enjoyment with the freehold, although the limitations be to uses strictly applicable to freehold property only. (3)

In a case where there was a bequest to "Mrs. G." without any other description, it was referred to the Master to inquire who Mrs. G. was. (4) Evidence also is admissible, to shew that

to mean "situate in," said, "In the decided cases in which these words have occurred, and wherein it was held, that property in question did not pass, the character of the property was such as not to admit this interpretation of the words." In *Blackwell v. Bull*, 1 Keen, 176, a testator directed, that his business of a cheesemonger should be carried on by his "wife Sarah Bull, and his son John Bull, jointly for the mutual benefit of his family." "The testator died shortly after the date of his will, leaving his widow Sarah Bull, and the said John Bull, and five other children infants surviving him. It was held that the widow, as well as the children, were comprised in the word "family." Lord Langdale, in giving his judgment, said, "Under different circumstances it (the word, *family*.) may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding his wife; or in the absence of wife and children, it may mean his brothers or sisters, or his next of kin, or it may mean the genealogical stock from which he may have

sprung. All these applications of the word, and some others, are found in common parlance; and, in the case of a will, we must endeavour to ascertain the meaning, in which the testator employed the word, by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will; and applying these considerations to the present case, I am of opinion, that in the words 'my family,' the testator clearly intended to comprise his wife."

(1) *Rose v. Bartlett*, Cro. Car. 392, cited by Sir John Leach, in *Hobson v. Blackburn*, 1 M. & K. 579.

(2) *Thompson v. Lady Lawley*, 2 B. & P. 303.

(3) By Sir John Leach, *Hobson v. Blackburn*, 1 M. & K. 571. R. acc. *Goodman v. Edwards*, 2 M. & K. 759. *Newton v. Lucas*, 6 Sim. 54, and on appeal, 1 M. & K. 391. See also the cases of *Lowe v. Lord Huntingtower*, and *Standen v. Standen*, cited and commented on in the judgment in *Miller v. Travers*, *supra*, 722-3.

(4) *Abbott v. Massie*, 3 Ves. 148.

a name used in a will is a nickname, which the claimant of the legacy bore, and by which he was known to the testator. (1) In the same process of comparison between the description and the surrounding circumstances, the term "child," in a will may mean an illegitimate child, dependant upon the circumstance of the testator having no legitimate issue. (2) In such cases, the evidence is admitted, for the purpose of putting the judge in the place of the author of the instrument.

The operation of a will may vary in some cases according to the estate, or the quantity of interest, which a grantor or devisor had at the time of making his deed or will. (3) So it may vary, according to the situation or interest of the grantee or devisee.

If a person grant an estate for life generally, without saying whether for his own life or for the life of the grantee, evidence is admissible to shew, what interest the grantor had in the premises; for if he was tenant in fee, the grantee would have an estate for his own life; but, if he was tenant in tail or for life only, then the grantee would have an estate for the life of the grantor. (4) Or, if a testator bequeath such a sum in a particular stock, it will be a specific legacy, if he has that stock at the time; not specific, if he has it not. (4) Evidence is therefore admissible, in such a case, to shew, what was the

(1) *Edge v. Salisbury*, Amb. 70. *Dowset v. Sweet*, *ib.* 175. "Evidence," said Parke, J., in *Doe v. Watson*, 4 B. & Adol. 800, is "admissible to shew not what the testator intended, but what he understood to be signified by the words he used in his will." On this ground seem to depend the authorities in equity, that though "to raise a question of election, a clear intention to pass the particular estate must appear, which must appear upon the face of the instrument, still extrinsic evidence has been allowed to shew what the tes-

tator considered as his estate, and consequently to determine what passed under a general devise, so as to put a party to his election." Sugden on Powers, 6th edit. 163. *So of Satisfaction*, *ib.* 170.

(2) See *Doe dem. Hayter v. Joinville*, 3 East, 173, an ineffectual attempt to ascertain the persons designated by the word "family."

(3) See Mr. Justice Bayley's judgment in *Smith dem. Earl of Jersey v. Doe*, 2 B. & B. 551.

(4) *Ibid.*

state of property at the time when he made his will ; and the construction upon the will is, one way or the other, according to the result. (1)

Another case, in which evidence of the state and amount of the testator's property has been admitted, is the case of *Fonnercau v. Poyntz*; (2) where Lord Thurlow received the evidence, not to control a bequest, which was distinctly and accurately described, but because it was uncertain, upon the whole context, whether the testator meant so much *per annum* or so much as a gross sum. Lord Thurlow decided the case as a case of ambiguity. And Lord Alvanley, in observing on this case, says, (3) " Lord Thurlow's only doubt was, whether parol evidence was admissible to ascertain, whether the testator did not mean capital, but " *he had no doubt he must know all the circumstances of his affairs.*" (4) In the construction, however, of wills free from ambiguity, the general rule is, that evidence of the value of the estate devised, or of the amount of the testator's property, will not be admitted, in order to raise an argument in favour of a particular construction ; whatever may be the amount, the general rule of construction must prevail. (5)

In the case of *Smith v. Doe*, on the demise of the Earl of Jersey; (6) decided by the House of Lords on a writ of error, where the principal question was on a clause of re-entry in a lease, under the execution of a power in a deed of marriage-settlement, by which the settler was authorized to demise

(1) Devise "to A. and his heirs, if he shall die without heirs, to B." if B. is capable of being collateral heir to A., the word "heirs" will be construed "heirs of his body." *Fearne*, 466; *ib. n. 7*, cited in *Wigram on Extrinsic Evidence*, 57. See also *Horton v. Horton*, *ib. Cro. Jac.* 74. Devise to A. after the death of B. gives B. an estate for life, if B. be the heir of the deviser, otherwise not.

(2) 1 Bro. C. C. 172; cited and commented on by Mr. Justice Bayley in *Smith v. Doe dem. Lord*

Jersey, 2 Brod. & Bing. 552.

(3) 3 Ves. 320.

(4) On this case of *Fonnercau v. Poyntz*, see also 3 *Merivale*, 319, 320.

(5) *Doe dem. Handson v. Fyldes*, *Cowp.* 833. *Standen v. Standen*, 2 Ves. jun. 593. *Richardson v. Edmonds*, 7 T. R. 640. *Doe v. Dring*, 2 Maule & Selw. 455. *Bootle v. Blundell*, 1 *Merivale*, 216. *Jones v. Tucker*, 2 *Merivale*, 537. *Attorney General v. Grote*, 3 *Merivale*, 316.

(6) 2 Brod. & Bing. 473.

Indefinite term
in a power.

by indenture such premises as were, then leased for lives, &c. and so as the ancient accustomed rents were reserved, &c. and so as the lease contained a *power of re-entry* for non-payment of the rent reserved, &c., the House of Lords determined, that it was allowable to prove, that the usual and accustomed form of leases (by which the estate, settled in the marriage-settlement, had been demised, as well before as after the date of the settlement,) had contained a *conditional proviso of re-entry* similar to the one in the indenture, whose validity was then disputed. "This evidence," said Mr. Justice Bayley, in his judgment in the House of Lords, (1) "is not admitted, to produce a construction contrary to the direct and natural meaning of the words; not to control a provision, which was distinct, and accurately described; but because there is an ambiguity upon the face of the instrument," (for the deed of settlement required the leases to contain a *power of re-entry* generally, *on non-payment of rent*, and there are various forms of powers of re-entry), "because an indefinite expression is used, capable of being satisfied in more ways than one. I look to the state of the property at the time, to the estate and interest which the settler had, and the situation in which the settler stood with regard to the property settled, to see whether that estate, or interest, or situation, will assist us in judging what the settler meant by that indefinite expression."

It may be laid down as a general rule, that all facts relating to the subject-matter and object of the devise, such as that it was, or was not, in the possession of the testator,—or relating to the mode of acquiring it, the local situation, and the distribution of the property,—are admissible, to aid in ascertaining what is meant by the words used in a will. (2)

In ascertaining the meaning of every statute that is passed, the same inquiry is instituted into the circumstances contem-

(1) 2 Brod. & Bing. 553. 5 Barn. & Ald. 387.

(2) By Parke, J., Doe dem. Templeman v. Martin, 4 B. & Ad. 785, and it is added in the report of S. C. 1 Nev. & M. 524. "The Court may take such things into

consideration as to put themselves in the place of the testator, and then see how the terms of the will affect the property." See also Sir John Eden v. The Earl of Bute, 7 Bro. P. C. 445, fol. edit.

poraneous with the making of it,—not only into the state of the law upon the facts to which it professes to relate, but also into the circumstances which make the interference of the legislature necessary; and, in the construction of ancient statutes, upon the same principle the circumstances existing at the time are referred to, as matter of history. (1) “It was resolved by the Judges,” says Lord Coke, “that for the sure and true interpretation of all statutes in general (be they penal, or beneficial, restrictive, or enlarging of the common law), four things are to be discerned and considered: 1st. What was the common law before the making of the acts: 2nd. What was the mischief and defect, for which the common law did not provide: 3rd. What remedy the parliament hath resolved and appointed, to cure the disease of the commonwealth: and 4th. The true reason and remedy; and then the office of all the Judges is always to make such construction, as shall suppress the mischief, and advance the remedy.” (2)

Circumstances
to shew mean-
ing of writing.

There are other cases, depending on the same principle, in which the situation of the party to the writing, or the subject-matter to which it relates, has been allowed more directly to affix a particular sense to words, though these words have a different meaning, if taken in their ordinary acceptation. (3)

(1) Upon a question whether gambling in foreign stocks was prohibited by the stat. 7 Geo. 2, c. 8, much reliance was placed upon the fact, that it did not appear that at the time when that statute was passed, foreign stocks existed: see judgment of Tindal, C. J. in *Wells v. Porter*, 2 Bing. N. C. 729. And in the case of the Duke of Devonshire *v. Lodge*, 7 B. & C. 39, where the question was, whether grouse were birds of warren, in the arguments and the judgment, reference was made to the ancient modes of taking that kind of game, and to the parts of the country in which it had been known to exist.

(2) *Heydon's case*, 3 Rep. 7. b.

(3) In *Simpson v. Henderson*, M. & M. 300, in an action for a breach of covenant that a ship

should take goods on board “forthwith,” Lord Tenterden, admitting that that word in strictness meant “immediately,” received evidence of the circumstances of the ship, and the situation of the parties, to shew that it could not have been used in that sense. “It was known to both parties that the ship required some repairs, at least to be coppered, and some time must be allowed for that.” So, “where a testator *having no children* devises property in default or failure of issue of himself, it is considered that the evident object of the testator is simply to make the devise contingent in the event of his leaving no issue surviving him, and not to refer to a future indefinite failure of issue.” 2 Powell on Devises, by Jarman, 567.

If the instrument be written by a person of a particular class, or with reference to a particular subject-matter, evidence is admissible to shew, that among that class of persons, or with reference to that subject-matter, a particular sense is, by usage, (1) attached to the words, different from the popular sense. (2)

In an action for a breach of covenant, to pay, on the expiration of a lease, 60*l.* per thousand for 10,000 rabbits, which the plaintiff covenanted to leave on a warren, it was held, that parol evidence was admissible to shew, that, by the custom of the country, a thousand meant 100 dozen. (3) So, where there was a covenant in a lease of coal-mines, to get all the coal lying under certain closes not deeper or below "the level of the bottom of the said mine," it was held that parol evidence was admissible, to shew that among miners "level" would be construed in the sense of geological stratum, and might therefore mean a line above or below the horizontal depth of the bottom of the mine mentioned. (4)

(1) Usage may be applied to written instruments for two purposes: first, with the view under consideration, of ascertaining the meaning of the terms used; secondly, for the purpose of adding new terms, as in the case of leases construed with reference to the agricultural custom of the country. The discussion of the rules governing the admissibility of it for the latter purpose, falls within the second section, treating of additions to written instruments.

(2) See Lord Ellenborough's judgment in *Robertson v. French*, 4 East, 135, and Lord Tenterden's in *Taylor v. Briggs*, 2 C. & P. 525.

(3) *Smith v. Wilson*, 3 B. & Ad. 728.

(4) *Clayton v. Gregson*, 4 Nev. & M. 602. See also *Lane v. Earl Stanhope*, 6 T. R. evidence of meaning of word "farms." *Richardson v. Watson*, 4 B. & Adol. 787. S. C. 1 Nev. & M. 567, meaning of the word "close." *Taylor v. Briggs*, 2 C. & P. 525, mercantile meaning of "cotton in bales." So where an insurance was on a ship from London to the

East Indies warranted to depart with convoy, the Court held, that the clause of warranty must be construed according to the custom of merchants; that is from such place where convoys are to be had, as from the Downs; *Lethulier's case*, 2 Salk. 443. So where the insurance is on goods till landed, and the defence is, that the plaintiff has been guilty of unreasonable delay in landing, the question is only to be decided by knowing the usual practice of the trade, with which every underwriter is supposed to be acquainted, whether the practice has been long or recently established. *Noble v. Kennoway*, 1 Dougl. 510. *Vallance v. Dower*, 1 Camp. 503. In *Haynes v. Holliday*, 7 Bing. 582, an action for refusing to take on ship-board a boat of certain dimensions, evidence was admitted to shew that on shipping a boat of that size, the deck was always taken off, and the plaintiff having refused to allow the deck of the boat to be removed, it was held he was not entitled to recover. In *Bold v. Rayner*, 1 M. & W. 343, evidence of mercantile

Lord Hardwicke (1) has given the reason for the admission of this kind of evidence in cases of mercantile contracts, which applies as well to other similar cases. (2) "Courts of Law examine and hear witnesses as to the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which, though short, yet is understood by them, and must be the rule of construction."

In the class of cases above alluded to, evidence is admissible to assign to words a sense different from their own popular sense; the necessity for the right understanding of words, which appear to the Judge to be insensible, is still more evident. If an instrument be written in a language which the Judge does not understand, he must call to his assistance the evidence of persons who understand that language. Indeed, to reject such evidence would make the interpretation of an instrument dependant not upon any definite rules, but upon the accidental circumstance of the degree of information possessed by the Judge. In a case where an artist gave by his will all his "bankers," evidence was admitted, which shewed that "bankers" were solid pieces of wood, on which were placed blocks of marble about to be worked; (3) in the same will the word "mod" was found, (4) and liberty was given for trying to ascertain its meaning, by evidence of persons generally conversant with the subject matters to which the will related. So if the handwriting of a

usage was admitted, that a bought note of goods to be delivered from "the Speedy or Charlotte expected to arrive"—and a sold note of the goods "ex Speedy and Charlotte to arrive"—meant the same thing, and that the seller had the option to deliver the goods from either vessel. See also the cases collected, of evidence of usage to explain the meaning of words used in a policy of insurance. *Park on Insurance*, 7th edit. 55 and 179, and see *Gabay v. Lloyd*, 3 B. & C. 793; and *Blackett v. Royal Exchange Assurance Co.*, 2 C. & J. 249. Usage may be admissible to explain what is doubtful; it is not admissible to contradict what is plain," *ib.* by Lord Lyndhurst, in delivering the judgment of the

court.

(1) 1 Ves. 459. And see 2 Ves. 33. *Edie v. East India Com.* 2 Burr. 1216. *Chaurand v. Angerstein*, Peake, N. P. C. 43. *Cochran v. Retsberg*, 3 Esp. N. P. C. 121. *Uhde v. Waters*, 3 Camp. 16. *Birch v. Depeyster*, 1 Stark, N. P. C. 210. 4 Camp. 385, S. C.

(2) By Parke, J., "Although that principle has been more frequently applied to mercantile instruments than to others, it is not confined to them." *Smith v. Wilson*, 3 B. & Ad. 733.

(3) *Goblet v. Beechey*, 3 Sim. 24, *supra*, 730.

(4) The decision on appeal in this case was, not that the parol evidence was inadmissible, but that, when admitted, it was insufficient.

will is difficult to be read, the evidence of persons skilled in decyphering writing is admissible to shew what the writing is. (1)

Evidence of intention.

The rule being, that evidence to construe an instrument is admitted only for the purpose of ascertaining the meaning of the instrument itself, it follows that evidence cannot be received for the purpose of shewing, not what is the effect of the words actually inserted in the instrument, but what the party intended to insert. (2) "In expounding a will, the Court is to ascertain, not what the testator actually intended, as contra-distinguished from what his words express, but what is the meaning of the words he has used." (3)

Goodings v. Goodings.

In the judgment of Lord Hardwicke, in the case of *Goodings v. Goodings*, (4) a distinction is taken with reference to the objects with which evidence of intention is admissible. In that case a man devised a legacy to such of his nearest relations as his executors should think poor and objects of charity. Evidence was rejected of the testator's intention not to confine it to relations entitled under the Statute of Distributions. The Lord Chancellor said, "Although parol evidence cannot be read to prove instructions of the testator, after the will is reduced into writing, or declarations as to the persons whom he meant by the written words of the will: yet that is different from reading it, to prove that the testator knew he had such relations, to establish which fact it may be read; but it cannot go any further. And though

(1) *Masters v. Masters*, 1 P. Wms. 425. *Norman v. Morrell*, 4 Vesey, 769. *Goblet v. Beechey*, 3 Sim. 24.

(2) By Parke, J., *Doe v. Martin*, 4 B. & Ad. 786.

(3) By Parke, J., in *Doe d. Guillim v. Guillim*, 5 B. & Ad. 129. See also *Doe d. Sewell v. Parrott*, 3 B. & Adol. 472. *Richardson v. Watson*, 4 B. & Adol. 800. See also the rule propounded by Lord Eldon, in *Thompson v. Lady Lawley*, 2 B. & P. 308, adopted by his lordship from the judgment of Lord Kenyon, in *Lane v. Lord Stanhope*, 6 T. R. 353, and by Lord Tenterden, in delivering judgment in *Doe d. Gore v. Langton*, 2 B. & Ad. 693. On the general doctrine of evidence of intention, see *Brett v. Rigden*,

Plowden, 345. "All that is effectual, and to the purpose, must be in writing, without seeking the aid of words not written." *Challoner v. Bowyer*, 2 Leon. 70. *Vernon's case*, 4 Rep. 4, a. R. acc. *Towers v. Moor*, 2 Vern. 98. *Strode v. Russell*, id. 625. *Lawrence v. Dodwell*, 1 Lord Raym. 438. *Bertie v. Falkland*, 1 Salk. 231. *Lord Lansdown's case*, 10 Mad. 99. *Maybank v. Brooks*, 1 Bro. C. C. 84. "You cannot refer to extrinsic evidence to construe a will; but you may, to shew with reference to what the will was made, by Lord Eldon in *Bengough v. Walker*," 15 Ves. 514. *Herbert v. Reid*, 16 Ves. 486, 489.

(4) 1 Vesey, 231.

this is a nice distinction, yet it is a distinction in the reason of the thing, nor can any mischief arise from admitting it." Evidence of intention.

In a very recent case, the admission of direct evidence of intention seems to have been carried further than would be warranted by the rule so laid down by Lord Hardwicke, if taken literally, respecting the declarations of a testator as to the persons whom he intended to designate in his will. In the case of *Doe* on the demise of *Gord v. Needs*, (1) a testator by his will, gave several legacies to George Gord, the son of George Gord, and to George Gord, the son of John Gord, and there was also in the will a devise to George Gord, the son of Gord. It seems, though not expressly stated in the report of the case, that there were two persons living at the time of the making of the will, George the son of John Gord, and George the son of George Gord. The latter was the lessor of the plaintiff, and claimed the land in question under the devise to George Gord, the son of Gord; and "he offered evidence of declarations by the testator, shewing that he, the lessor of the plaintiff, was the intended devisee." The evidence having been received, the propriety of its admission was brought before the Court of Exchequer, by a motion for a new trial; and judgment was given, that the evidence had been properly received. "The point to be considered," said Parke, B., "in delivering the judgment of the Court is, whether evidence was properly admitted, to shew what person the testator meant to designate by the description of George Gord, the son of Gord. If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual: such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule, (2) which ambiguity could not be helped by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, "to make that pass without writing, which the law appointeth shall not pass but by writing." But here, on the face of the devise, no such doubt arises. There is no *blank* before the name of Gord the

(1) 2 M. & W. 129.

(2) Maxims, 25.

Evidence of
intention.

father, which might have occasioned a doubt whether the deviser had finally fixed on any *certain* person in his mind. The deviser has clearly selected a particular individual as the devisee. Let us then consider, what would have been the case, if there had been no mention in the will of any *other* George Gord, the son of a Gord: on that supposition there is no doubt, upon the authorities, but that evidence of the deviser's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the deviser, and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is, that he has the manors both of North S. and South S.; in which case Lord Bacon says, "it shall be holpen by averment, whether of them was that which the party intended to pass." The learned Judge then cited *Altham's case*, (1) *Counden v. Clarke*, (2) and *Doe v. Morgan*, (3) as authorities exactly in point, and said, "the characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables the Court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of the two the deviser understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills. There would then have been no doubt whatever of the admissibility of evidence of the deviser's intention, if the devise to "George, the son of Gord," had stood alone, and no mention had been made in the will of George, the son of *John* Gord, and George, the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of "George, the son of Gord," prevent the application of

(1) 8 Rep. 155, a.

(2) Hob. 32.

(3) 1 C. & M. 235.

this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will, has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: it shews that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known; and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which, so far as it goes, is perfectly correct. In the case of *Doe v. Morgan*, above referred to, precisely the same circumstance occurred."

Evidence of intention.

The rule governing the admissibility of extrinsic evidence, with reference to the sense of words used in a written instrument, is thus laid down by Lord Ellenborough, in the case of *Robertson v. French*. (1) "Terms are to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, or by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words."

Limitation of evidence of sense of words.

On the comparison of the description with the subject matter, that which most nearly agrees with it must be taken to have been meant, and evidence is inadmissible to rebut that inference. (2) "The rule, as stated by Lord Bacon, is, that if

No evidence to countervail description.

(1) 4 East, 135. With this rule agree the cases of *Taylor v. Briggs*, 2 C. & P. 525, (meaning of "bale"); *Smith v. Wilson*, 3 B. & Ad. 728; *Clayton v. Gregson*, 4 N. & M. 602. *Bold v. Rayner*, 1 M. & W. 343. And see the judgment of Lord Lyndhurst in *Blackett v. Royal Exchange Assur. Co.*, 2 C. & J. 249.

(2) It is often stated, in reported cases, as a reason for the admission of parol evidence, that without such evidence, the instrument cannot take effect. It is not easy to estimate the value of this rea-

son, in determining the admissibility of parol evidence. The only case free from all difficulty is, where the written instrument contains a description apparently precise in its terms, and where upon inquiry the subject matter is found to correspond with that description in every particular, and (to use the language of the judgment in *Miller v. Travers*) following out and filling the words of the author. It has been seen, that in some cases an instrument may be sufficient, though the description in it is in some respects erroneous; and it is to such

No evidence to
countervail
description.

there be some land, wherein all the demonstrations in a grant are true, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true." (1) In the case of *Doe d. Ashforth v. Bower*, (2) there was a devise of houses and land by the description "all my messuages situate in or near a street called Snig Hill in Sheffield, which I lately purchased of the Duke of Norfolk's trustees:" the deviser had four houses in Sheffield near Snig Hill, and two about four hundred yards from it; all the six had been purchased by him of the Duke of Norfolk's trustees. It was held, that proof of the whole having been bought by the deviser in one contract, conveyed by one deed, redeemed together from the land tax, and for one consideration, was not sufficient to make the two houses, which were not near Snig Hill, pass by the devise.

It seems to make no difference in the application of this rule, whether the description is expressed in several terms, or in one: (3) if the description be "child," an illegitimate child could not be allowed to take, when there is a legitimate child. (4) Bro-

cases only, that the reason given for admitting parol evidence, (namely, that without it the instrument could not take effect,) seems to be applicable; this reason not meaning that a description, capable of applying the instrument, can be dispensed with, but restraining the use of the rule (*falsa demonstratio non nocet*) to cases in which a complete correspondence, between the description and a subject matter, does not exist, and evolving the rule above given in the words of the maxim, *non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram*. Bacon's *Max. Reg.* 13.

(1) By Parke, J., *Doe d. Ashforth v. Bower*, 3 B. & Ad. 459. "If a testator devises property by a description which completely tallies with it, you are not at liberty to say that some other property, than that with which the description tallies, passed by the devise." By Sir Lancelot Shadwell, *Newton v. Lucas*, 6 Sim. 60. See also *Doe d. Preedy v. Holtom*, 4 A. & E. 81.

(2) 3 B. & Ad. 453.

(3) If the term, with all the evidence that can be given of what the author understood to be designated by it, have not comprehension to take in the subject matter of inferior pretensions, it seems to fall within the class of words insensible, or incapable of application.

(4) In *Gill v. Shelley*, 2 Russ. & M. 336, it was held, that under the "expression the children of A. B., &c." an illegitimate child might take with a legitimate child, parol evidence shewing that A. B. had, at the time the will was made, one legitimate, and one illegitimate child, and that the latter had acquired the reputation of being a child of A. B. In this case the one legitimate child could not have satisfied the words "the children." Sir John Leach said, *primæ facie*, the term children is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named,

thers and sisters would take under the term "family," in the absence of a wife and children. (1)

Evidence of usage, for construing ancient instruments, seems to be nothing more than secondary evidence of facts which, by the rules before considered, would have been contemporaneously admissible for the same purpose. The meaning also of language used in ancient instruments may have changed in lapse of time, or have become doubtful. The reason for the admission of evidence of usage will determine the limits within which it is confined; if the usage is not consistent with that meaning of the instrument, which, by the rules of law, might at the time of its date have been attributed to it, the evidence cannot be received; in other words, it is inadmissible to control, or contradict, the express provisions of the instrument. (2)

Evidence of
ancient u-age.

Continued usage is a strong practical exposition of the meaning of the parties. And modern usage, of forty or fifty year's duration, is evidence not only for that period, but evidence from which it may be presumed, if nothing is shewn to the contrary, that the same course was pursued in earlier times. (3) Even in the case of an act of parliament, universal usage has been referred to as a proper expositor, where the language is doubtful. (4) Lord Coke, in commenting on the

no illegitimate child can take under the description of children. In a late part of the judgment, some doubt appears to be thrown by the learned Judge upon the instance of the application of the rule, (contained in the position, he had before laid down, that no illegitimate child could take with legitimate children, under the description of children,) observing that that point was denied by the judges in *Wilkinson v. Adam*, 1 Ves. & B. 462. Supposing a testator to have had children by his wife before marriage, as well as after, and that they had all alike acquired the reputation of being his children, and had been treated by him as such, it would seem difficult to distinguish the case of a devise to his children, from that in which leasehold has been held

to pass under the description of freehold, it having been blended in enjoyment with the freehold property.

(1) See the judgment of Lord Langdale in *Blackwell v. Bull*, *supra*, 733, n.

(2) *Supra*, p. 732. And see *Rex v. Salway*, 9 B. & C. 424.

(3) By Richardson, J., 2 Brod. & Bing. 409.

(4) Where the penning of a statute is dubious, long usage is a just medium for expounding it; *jus et norma loquendi* is governed by usage. And the meaning of things spoken or written must be, as it has constantly been taken to be by common acceptance. But if usage has been against the obvious meaning of an act of parliament, by the vulgar and common acceptance of the words, then it

statute of Gloucester, says, that when any claimed before the justices in eyre any franchises by ancient charter, if the words were general, and a continual possession was pleaded of the franchises claimed,—or if the claim was by old and obscure words, and the party in pleading expounded them to the Court, and averred continual possession according to that exposition,—the entry was ever, *inquiratur super possessionem et usum*; “and this,” adds Lord Coke, “I have observed in divers records of those eyres, agreeably to that old rule, *optimus interpret rerum usus*.” (1) The uniform course of modern authorities fully establishes the rule, that, however general the words of ancient grants may be, they are to be construed by evidence of the manner, in which the thing has been always possessed and used. (2) Thus, on an information to set aside an election to a perpetual curacy, it appeared, that the improper rectory, out of which the curacy arose, had been granted in trust for the use of the parishioners and inhabitants of a parish for ever; on the part of the relators it was insisted, that the right of nomination to the vicarage ought to be confined to inhabitants paying scot and lot, or to persons paying to church and poor; and on the part of the defendants, that it extended to all housekeepers in general: Lord Hardwicke, in delivering his judgment, said, “some sort of limitation is allowed by both sides to have been put by usage on the liberality of the grant; and in the construction of ancient grants and deeds there is no better way of construing them, than by usage; *contemporaneo expositio* is the best way to go by;” and since in this case there was evidence of housekeepers having constantly voted, Lord Hardwicke held, that this usage ought to prevail. (3)

is rather an oppression of those concerned, than an exposition of the act, especially as the usage may be circumstanced. *Shepherd v. Gosnold*, Vaugh. 169. And see *Rex v. Scott*, 3 T. R. 104. And in a very recent, important, and much considered case, *The Bank of England v. Anderson*, 3 Bing. N. C. 666, the Court of Common Pleas, in the exposition of the statutes respecting the privileges of the Bank of England placed great reliance on the

usage which had prevailed under them; the Court said, “if no other argument were brought forward, we attribute great weight to the maxim of law, *contemporanea expositio fortissima est in lege*.”

(1) 2 Inst. 282.

(2) *Weld v. Hornby*, 7 East, 199. *Rex v. Osbourne*, 4 East, 327.

(3) *The Att. Gen. v. Parker and others*, 3 Atk. 576. *The Att. Gen. v. Forster*, 10 Ves. 365.

The reasons, which warrant the admission of evidence of usage, apply equally, whether it be required to aid the construction of an ancient public instrument, or of a private deed. (1)

Usage to explain private instruments.

In the case of *Withnell v. Gartham*, (2) where the question was, on the construction of an ancient deed granting to the minister and churchwardens of a parish the power of appointing a schoolmaster, whether all the churchwardens must concur, or whether the act of the majority was sufficient, and the jury found the usage to be in favour of the appointment by a majority, Lord Kenyon, in speaking of the usage, and advert- ing to an argument, which had been insisted on (namely, that the Court ought to reject the evidence of usage, because the instances proved were not as ancient as the deed, and also be- cause usage cannot be let in to explain a private deed), said, that if the first reason were sufficient to reject the usage, it would be difficult to know, how far such an objection might extend. In many cases a party undertakes to prove a custom from the time of legal memory; but that proof is generally established by evidence of facts done at a much later period. And as to the second objection, Lord Kenyon said, there was no difference in that respect between a private deed and a king's charter; in both cases evidence of usage might be given to expound them.

Thus, also, in the case, (3) of *Stammers v. Dixon*, in an action for entering the plaintiff's close, where the defendant pleaded, that the close was copyhold, and justified under a grant from the lord

(1) In one case, *Cooke v. Booth*, Cowp. 419, where it was doubtful, whether a covenant for renewal ex- tended to a perpetual renewal, and the parties had renewed four times successively, the Court of King's Bench held, that the legal effect was a perpetual renewal, on the ground that the parties themselves had, by their own acts, put a con- struction on the covenant, and that the Court could not say the con- trary. This case has been univer- sally disapproved of, and must be considered to be over-ruled. *Bayn- ham v. Guy's Hospital*, 3 Ves. 493. *Eaton v. Lyon*, *Ibid.* 694. *Iggul-*

den v. May, 9 Ves. 333. 7 B. & P. N. R. 452. *Clifton v. Walmsley*, 5 T. R. 566. It has been supposed, that the over-ruling of *Cooke v. Booth* amounts to a decision, that evidence of usage is not admissible to explain private instruments; but if the reason for the admission of it in any case be considered, the de- cision in that case will appear to be unwarranted by it. It is a case of misapplication of the rule.

(2) 6 T. R. 388.

(3) *Stammers v. Dixon*, 7 East, 200, *Wadley v. Bayliss*, 5 Taunt. 752. *Lord Petre v. Blencoe*, 4 Gwill. 1484.

and by the command of the copyholder; in support of this plea the defendant proved, that the person, under whom he justified, and all those whose estate he had, for a long course of years had constantly taken the forecrop of grass and pasturage from the close, and then proved, by court rolls of the manor, admissions to a copyhold tenement "of three acres of meadow," (which was admitted to be the close in question), but every other benefit of the land, except the forecrop, had been enjoyed by those from whom the plaintiff claimed. Mr. Justice Heath, who tried the cause, was of opinion, "that, although the terms of the surrender and admission were sufficiently comprehensive to pass the soil and freehold, yet, as in ancient grants the legal import might be restrained by long and concomitant usage, which might be taken as evidence of the original intent of the parties in making the grant, so here the grant might be restrained by the received usage, and only pass the forecrop, which would not carry the soil. And the Court of King's Bench agreed in this construction of the written evidence; and held, that the terms of the admissions were not incompatible with the plaintiff's right, and might receive a construction conformable to the usage.

Upon the same doctrine depends the great authority which, in construing a statute, is attributed to the construction put upon it by Judges who lived about the time, or soon after the statute was made, as being best able to judge of the intention of the legislature, (1) not only by the ordinary rules of construction, but especially from knowing the circumstances to which it had relation.

(1) *Bac. Abr. Stat. I. 5, p. 648.* "From which cases it appears, that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance;—those statutes which comprehend all things in the letter, they have expounded to extend but to some things,—and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it,—and those which include every person in the letter they have adjudged to reach to some persons only,—which expositions have al-

ways been founded upon the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant with reason and good discretion." *Stradling v. Morgan, Plowd. 205, vide supra, 736-7, and 745.*

The evidence, admitted according to the principles already considered, has for it's object to ascertain what is expressed in the writing. When after all the legitimate evidence has been received, the instrument still remains doubtful, the obscurity, thus patent on the face of the writing, cannot by the rules of law, be removed by parol evidence. "*Ambiguitas patens*," says Lord Bacon, (1) (that is, an ambiguity apparent on the deed or instrument) "cannot be helped by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averment, and so in effect to make that pass without deed, which the law appoints shall not pass but by deed. It holds generally," he adds, "that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or in some cases by election, but never by averment; but rather shall make the deed void for uncertainty."

Patent ambiguity.

In the case of a will, if any devise is expressed doubtfully and with uncertainty, the only construction, which it is capable of receiving, is by comparing it with the other parts of the will: the declarations of the testator are not admissible to remove the apparent ambiguity, or to explain his intention. As, for example, if the devise is to "one of the sons of J. S.," who has several sons, such an uncertainty in the description of the devisee cannot be explained by parol proof. (2) So in a case, where the testator made dispositions in his will to several persons, among others to his wife and niece, who were the only women mentioned in the will, and then devised "to her" a particular estate for life, the question was, whether parol evidence could be admitted, to shew which of the two was intended: the Lord Chancellor refused to receive it, on the ground, that it would tend to put it in the power of witnesses to make wills for testators; the Court held, that though the

Uncertainty in devise.

(1) Bac. Elem. rule 23. Doe v. Lord Clinton, 2 Merivale, 343.
dem. Tyrrell v. Lyford, 4 Maule & Selw. 550. Lord Cholmondeley

(2) 2 Vern. 624. 8 Rep. 155, a.

term "her" was relative, it was to be referred in this case to the wife, because in other parts of the will it seemed to relate to the wife; but expressly excluded the parol evidence offered to explain the will. (1)

Omission of
name in a will.

A blank in a will, for the devisee's name, is an instance of patent ambiguity, and parol evidence cannot be admitted to shew, what person's name the testator intended to insert. (2)

Reference to
another instru-
ment.

Where an instrument professes to refer to some additional expression of the intention of the writer, it seems to be clearly settled, that such extrinsic matter must receive the same effect as if it were in the writing. The additional terms, sought to be engrafted, must, however, be in writing, if the instrument referring to it is required to be in writing.

In *Molineux v. Molineux*, (3) a testator gave by his will to his three children certain rents and annuities by the description "such several annuities, or annual rents as are expressed in several writings signed with my hand, and sealed with my seal, according to the true meaning of the said writings." In a special verdict the jury found, of what rents and annuities he had signed and sealed writings; and it was held, that they passed under the will. The Court said, it was a good devise in writing of the rents themselves, for it refers to the writing, whatever it is, as if it were specially limited in the will. And they said, that upon this reason, in *Fairfax's* case, it was resolved by the opinion of the Chief Justices, and the counsel of that Court, that where one makes a deed of feoffment to divers uses, and makes no livery, and after by his will devises the land to such persons, and in such manner as he appointed by his deed of feoffment, it was a good devise of the land. But they all held, that a will cannot refer to words only without writing.

(1) *Castleton v. Turner*, cited 2 Ves. 917.

(2) *Baylis v. The Attorney General*, 2 Atk. 239. *Castleton v.*

Turner, 3 Atk. 257. *Hunt v. Hart*, 3 Bro. Ch. C. 311.

(3) Cro. Jac. 144.

Where a disposition of property can only operate by a writing, (as in case of a will,) (1) an instrument referring to another must describe it so clearly, that by the description it may be identified; to allow parol evidence to shew an intention to connect two instruments together, (2) where there is no reference to a foreign instrument, or where the description of it is insufficient, would be to give it an effect independent of the writing, and contrary to the provision of law, which require the whole disposition to be expressed. (3) But it seems to be no violation of this rule, to admit evidence for the purpose of discovering the meaning of words used, in order to ascertain what instrument the reference means. The description must be compared with instruments, to which it may possibly refer; if the description is in some respects erro-

Reference to
another instru-
ment.

(1) Whether the objection applies, when by law a contract or other act may take effect by parol, is a question falling within the next section.

(2) *Brodie v. St. Paul*, 1 Ves. jun. 330. *Smart v. Prujean*, 6 Ves. 566. *Coles v. Trecothick*, 9 Ves. 249. *Oliver v. Cooke*, 1 Sch. & Lef. 22. *Boydell v. Drummond*, 11 East, 153. And see the judgment of Holroyd, J., in *Kenworthy v. Schofield*, 2 B. & C. 948.

(3) In *Sandford v. Raikes*, 1 Merivale, 646, 653, a testator made a direction in his will, which amounted in effect to a devise of so much of the produce of timber ordered to be cut down, as should be sufficient to pay for, a certain house. Sir William Grant held, that there was nothing in the fact referred to, (namely, an antecedent order for cutting down timber) which would justly make it less a subject of extrinsic evidence, than if there were a description of an estate as being in the occupation of B., or as being the estate that A. purchased. "The moment it was shewn, that there was a given number of trees growing in such a place, or ten thousand pounds worth in value of

the timber on such an estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain, as if the number, value, and situation of the trees had been specified in the will." The distinction seems to be between a reference to a fact merely as a mode of describing what is meant by the writing, and a reference to a foreign expression of an intention not contained in the writing; in the latter case terms are sought to be added to the writing. In *Mollineux v. Mollineux*, the devise was of certain rents expressed in several writings "according to the true meaning of the said writings;" and the above distinction is supported by the judges, and by their reference to *Fairfax's* case. The whole judgment taken together explains, what is meant by saying "a will cannot refer to words only." But the whole Court held, that a will cannot refer to words only without writing, but it ought to be a will in writing for all; and therefore there cannot be any averment to add anything thereto by words, *dehors*, nor to abridge it by a condition added thereto by words. What has been said is sometimes in itself a fact, and not merely a statement.

neous, the erroneous part may be rejected; if there are several instruments, evidence must be admitted to shew which was meant. In the case of *Hodges v. Horsfall*, (1) an instrument, purporting to be an agreement for a lease, contained a clause for the erection of additions, according to a plan agreed upon; it appeared that three distinct plans existed for making the additions alluded to: an objection was made that parol evidence was inadmissible, to determine which plan was meant. Lord Lyndhurst, in giving judgment, said, "I am of opinion on the authority of all the cases, and especially the case (in 1 Schoales and Lefroy,) where Lord Redesdale has considered the subject very fully, that as the written agreement refers specifically to a plan, if there be parol evidence, clear and satisfactory, to identify the particular plan, that evidence may be properly admitted for the purpose of so identifying it." (2)

(1) 1 Russ. & M. 116.

(2) See also *Sanderson v. Jackson*, 2 B. & P. 238, and the cases referred to in a note to a report of this case in the third edition; and the observations of the Lord Chancellor in the House of Lords in *Dillon v. Harris*, 4 Bligh. N. S. 343. In *Shortreede v. Check*, 1 Ad. & El. 57, *assumpsit* was brought upon a guarantee, in which the consideration was stated in the following form, "You will be so good as to withdraw the promissory note; and I, &c.:" a promissory note was proved at the trial, and no evidence was given of the existence of any other note, and the jury found that it was the note referred to. A motion was made for a new trial, on the ground that the description of the note was not sufficiently explicit, to ascertain what note was meant, without the admission of parol evidence. A rule was refused, and Littledale, J., said "It is true, the letter leaves it uncertain what the note was, and whether it was a note of the father or of the son; and if it had appeared, that there were two notes, one given by each, I do not think parol evidence could have been received, to shew which was meant. So, if there had been two notes in question for the same sum, but of

different dates. But when upon the evidence only one note appears to be in question, no such explanation is necessary;" and Parke, J., "The consideration being executory the plaintiff is to shew that he has fulfilled it, and for that purpose must of necessity prove by parol evidence, that the note withdrawn by him was the thing meant by the agreement. If it had appeared in proof, that there were two notes to which the promise might have applied, there might have been a difficulty as to explaining this by parol testimony. But when the evidence given is of one note only, it becomes perfectly clear that the plaintiff has complied with his part of the agreement." This case seems to be no authority against the principle above laid down; it seems to amount to no more than saying that if there had been more than one note shewn to be in existence, parol evidence would have been inadmissible to shew which note was intended to be described, and the description being so vague, it would have been incapable of shewing which note was described. The difficulty alluded to by Mr. Justice Parke, must, therefore, it seems, be understood to be a difficulty in fact. The fact relied on, by these learned judges, that there was but

SECTION II.

Of the Admissibility of Parol Evidence to add to, vary, or discharge written Instruments.

In the former section, inquiry was made as to the admissibility of parol evidence to ascertain the meaning of a written instrument, assuming the validity of it to be undisputed. It was stated as a general rule of law, that parol contemporaneous evidence is inadmissible to vary, or contradict the terms of a valid written instrument.

By the rule of law, independently of the statute of frauds, parol evidence cannot be received to contradict a written agreement: the instrument itself must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. (1) The reason assigned by Lord Coke against admitting parol evidence to contradict the terms of a deed, is very general, and applies to the case of a written agreement, though writing may not have been absolutely necessary.

Contracts
within statute
of frauds.

"It would be inconvenient," says Lord Coke, "that matters Deeds. in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such

one note, was in itself parol evidence of what note was meant. The case is an instance in which the meaning of a writing has been ascertained by viewing it in conjunction with the circumstances surrounding it. In every case where parol evidence raises a latent ambiguity, it may be, and

often has been, fatal; the evidence may be sufficient to raise the ambiguity, but not to remove it, and then the instrument is void for uncertainty.

(1) 2 Atk. 383. Sayer, 189. 2 Bro. Ch. C. 219. 7 Ves. 218. 4 Taunt. 786. 2 Barn. & Cress. 634.

nude averments against matter in writing should be admitted." (1)

Evidence not admissible to vary the time of holding in a lease.

A demise of lands by deed, to commence from Michaelmas-day, must be understood to be from New Michaelmas, since the act of Parliament for altering the style; unless there is some reference in the deed to a prior holding from Old Michaelmas, to show what the parties intended by using generally the term Michaelmas day. The general term, Michaelmas, being thus fixed by law to mean New Michaelmas, and nothing appearing in the deed, from which a different use of the term can be presumed, no parol evidence can be received to explain the time of holding stated in the deed. (2) But if the holding has been from Michalmas-day to Michaelmas-day, or from Lady-day to Lady-day, under a *parol* lease, and no evidence is produced, on the part of the plaintiff, to show, whether the parties intended the New Lady-day or the Old, in such a case evidence is admissible on the part of the defendant, of the custom and usage in the country, that such holdings are always understood to be from Old Lady-day. (3)

(1) Countess of Rutland's case, 5 Rep. 26. For examples, see Buckler v. Millerd, 2 Vent. 107. Tinney v. Tinney, 3 Atk. 8. 1 Wils. 34. Lord Irnham v. Child, 1 Dickins, 554. Brydges v. Duke of Chandos, 2 Ves. 417. Haynes v. Hare, 1 H. Black. 659. Clifton v. Walmsley, 5 T. R. 567. *Ex parte* Hooper, 2 Rose, B. C. 328.

(2) Doe dem. Spicer v. Lea, 11 East, 312. In this case, the tenant first held from *Old Michaelmas* by parol, then took a lease by deed from *Michaelmas*, and, after the expiration of that lease, held on without any new agreement.

(3) Such evidence was admitted by Lord Kenyon, in the case of Furley dem. Mayor of Canterbury v. Wood, 1 Esp. 198, cited by counsel in Doe v. Lea, 11 East, 312. Upon its being cited, the Court asked whether the lease was by deed. This case of Furley v. Wood was cited, and approved of

by the Court of King's Bench, in Doe dem. Hall v. Benson, 4 Barn. & Ald. 588, which warrants the position in the text. The Court of King's Bench made a distinction, in the latter case, between leases by *deed* and leases by *parol*. This distinction has reference to a subject discussed in the previous chapter—the admissibility of evidence of a customary sense of a word different to its usual sense. Upon the authorities there considered, it may be doubted whether evidence would now be rejected, if a custom and usage, that Michaelmas, in a demise under seal meant Old Michaelmas. There would be, of course, a distinction between a verbal demise, and a demise in writing, where contemporaneous parol evidence was offered to shew the understanding of the parties. In the case of a verbal demise, all that passed must be looked at to ascertain the meaning:

Policies of insurance are within the same rule, and cannot be contradicted or varied by any written agreement made by the parties before the time of signing the policy. Thus, in an early case, where, in an action on a policy of insurance from Archangel to Leghorn, the defendant attempted to shew, that the agreement before the subscription of the policy was, that the adventure should begin only from the Downs, the Court would not admit the evidence. (1) Lord Chief Justice Pemberton in that case said, that policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he who subscribes a bill of exchange, payable at such a day, shall be allowed to go from it, and say, it was agreed to be on condition, &c., when it may be that the bill had been negotiated; for though neither of them are specialties, they are of great credit, and much for the support and advantage of trade. The same rule of course applies to charter parties. In a case where a ship was chartered to wait for convoy at Portsmouth, Lord Kenyon would not suffer a parol agreement to be set up on the other side to substitute Corunna for Portsmouth. (2)

Policies of insurance.
Charter-parties.

otherwise, if the demise were by writing; in the latter case, evidence only would be admissible upon the principles before considered, to shew what was meant by the writing. The case of *Doe v. Benson* shews that the statutory alteration of the style has not given a conclusively arbitrary meaning to the words designating different periods of the year. In the case of *Doe d. Peters v. Hopkinson*, 3 D. & R. 507, the Court are reported to have held, that where there was a demise by writing, not under seal, parol evidence was admissible "to prove that the real understanding between the parties was, that a tenancy should commence at Old Lady Day," though the expression in the demise was general "from Lady Day." It is difficult to see on what principle this case, as reported, can be considered good law. It is probable there is a mistake in the report, and that the evidence received was of the custom of the

country. It is to be observed, that there is no *decision*, that evidence of the custom of the country of the periods, meant to be designated by the names of the feast days, is inadmissible. In *Doe v. Spicer*, the evidence offered went to shew, at most, by independent evidence, the intention of the parties, and was clearly inadmissible. *Doe v. Benson* contains merely *dicta* as to leases under seal, and the *dictum* of Lord Tenterden in it, "that the rule of law is, that evidence is not admissible to explain a deed," must be taken now with considerable qualification. As to incorporating terms in a writing by evidence of a custom, *vide infra*, 763.

(1) *Kaines v. Knightly*, Skin. 54. S. C. referred to in *Bates v. Graham*, 2 Salk. 444, but mis-stated. *Weston v. Emes*, 1 Taunt. 115. *Unde v. Walters*, 3 Campb. 16.

(2) *Lealie v. De la Torre*, cited 12 East, 583.

Contract for
seaman's
wages.

In the case of contracts of hiring between masters of ships and seamen (though they are directed by statute to be in writing, under a penalty to be inflicted on the master, and it has not been decided that they are void if unwritten), still, when once reduced into writing, they cannot be varied or added to by parol. Thus, it was ruled in the Court of Common Pleas, that a mate in a slave-ship could not, on the ground of a verbal promise, claim the perquisite of the price of a negro slave beyond the wages due to him by certain written articles of agreement, executed between the master, officers, and crew. (1)

Contract of
sale.

Where there has been a contract in writing for the sale of goods, specifying the quantity and the price, neither of the contracting parties would be allowed to give evidence of conversations previous to, or contemporaneous with the bargain, for the purpose of proving that the price was to be different, or that a different quantity was to be delivered; for this evidence would directly contradict the written memorandum, which must be considered as expressing the final intention and understanding of the parties at the time of the contract.

Promissory
note.

In an action on a promissory note or bill of exchange, the defendant will not be allowed to give evidence of an agreement between him and the plaintiff, at the time of making the note, that it should be renewed, and that payment should not be demanded on its becoming due. (2) Nor is parol evidence admissible to show, that a note, purporting to be payable on demand, was intended by the parties to be payable only on a contingency (3); or that a note, payable on a certain day, was intended to be payable on some other day. (4)

It seems that evidence is inadmissible to shew, that a party to a joint and several promissory note gave the note

(1) *White v. Wilson*, 2 Bos. & Pull. 116.

(2) *Hoare v. Graham*, 3 Campb. 57. *Hogg v. Snaith*, 1 Taunt. 347.

(3) *Rawson v. Walker*, 1 Starkie, N. P. C. 361. *Woodbridge v. Spooner*, 3 Barn. & Ald. 233. *Mose-*

ley v. Hanford, 10 B. & C. 729. *Foster v. Jolly*, 1 C. M. & R. 703.

Adams v. Wordley, 1 M. & W. 378.

(4) *Free v. Hawkins*, 1 Moore Rep. C. P. 535. 8 Taunt. 92. S. C.

as a security to the other party, to whom the holder, with a knowledge of that fact, has given time. (1)

Very different questions, however, from those above considered occur, when it is proposed to annul a written instrument altogether, by shewing that it was invalid *ab initio*,—to add by parol contemporaneous evidence to the terms of the instrument (its validity *pro tanto* not being disputed)—to shew that, since the writing, fresh terms have been introduced, or substituted by the parties—or that the instrument has been entirely abrogated by them.

Parol evidence is always admissible to shew that a written instrument is altogether void, or that in truth it never had any legal existence. This rule applies as well to instruments under seal, as to those which are executed without that solemnity. In the former case, the instrument being executed with great formality and care, it is not avoided by shewing that it was made without consideration; (2) but by the law of England, a party is not bound by an instrument not under seal, unless there is a consideration for the obligation it professes to impose upon him, and therefore, in this case, he is permitted to impeach the instrument, by shewing that no consideration passed between the parties. (3)

Parol evidence to annul a written instrument.

(1) *Fentum v. Pococke*, 5 Taunt. 192. *Price v. Edmunds*, 10 B. & C. 578. But see *Hall v. Wilcox*, M. & R. 58, *contra*.

(2) Upon this ground, in actions on promissory notes and bills of exchange, though the periods of payment cannot be varied, or other terms of the instrument be altered by parol evidence, evidence is admissible to shew that there was no consideration for a liability on the bill or note, even when, on its face, it expresses to be for value received. See *Foster v. Jolly*, 1 C. M. & R. 703, and the cases there cited and considered. Whether parol evidence goes to alter the terms of a bill or note, or to shew an absence of consideration, is the test of the admissibility of evidence offered to defeat its apparent effect. Under the latter head, evidence has

been held admissible to shew, that the drawer of a bill indorsed it to the plaintiff on an agreement that the acceptor only should be sued; and this, on the ground that the effect of such an agreement is, that, as between the drawer and the plaintiff, the indorsement was without consideration. *Pike v. Street*, 1 M. & M. 26.

(3) The doctrine of estoppel is discussed, *ante*, Part II., c. 1, s. 1. The admission of a fact in a writing under seal, made by a competent party, will, in general, estop him from disputing it, except in cases where the transaction was illegal. Consequently, a deed of assignment, which is expressly alleged, in the body of it, to be made in consideration of a certain sum of money paid down at the time of the execution, estops the assignor from

Illegal transaction.

A deed or other writing, whatever is stated on its face, may be impeached, by evidence which shews that it was made for the furtherance of objects, which the common or statute law has forbidden; thus a contract may be impeached for simony, for usury, for composition of a felony—because it was obtained from the party by fraud, felony, or duress—or because the instrument was invalid, as made when the party was incapable of entering into an obligation, being an infant, or under coverture. (1)

Fraud.

For the purpose of setting aside a will on the ground of fraud, parol evidence may be given of what passed at the time of the testator's signing, and what the testator said; as in the case of

Will.

Doe on the demise of *Small v. Allen*, (2) where it was proved,

shewing that no money passed. *Rowntree v. Jacob*, 2 Taunt. 141. *Lampan v. Cooke*, 5 B. & Ald. 606. *Baker v. Davey*, 1 B. & C. 707. A memorandum, indorsed on the deed, of the receipt of the money, is of a different description, and not being under seal, will not amount to an estoppel, but is evidence for the jury, capable, however, of being rebutted by the circumstances of the cases. *Lampan v. Cooke*, 5 B. & Ald. 611. An admission of a fact in a writing under seal is conclusive evidence of the fact; otherwise, if it be not under seal. In the latter case, if the writing is intended between the parties, merely as evidence of an act, the fact may be proved by parol evidence without producing the written evidence, and even in opposition to it. The case of a receipt is a familiar instance, and *vide ante*, 388, and see the case of *Rex v. Wrangle*, 1 Ad. & Ell. 515. There are some cases in which the policy of the law makes a writing conclusive evidence of a fact, *ex. gr.* by the R. H. 4 W. 4, an issue is required to contain a recital of the time when the writ issued, and a defendant will not now be allowed to controvert that recital. If a wrong date has been inserted, the trial may be set aside. *Whipple v. Manley*, 1 M. & W. 432.

(1) *Buckler v. Millard*, 2 Vent.

107. *Collins v. Blanters*, 2 Wils. 347. Bull. N. P. 173. *Paxton v. Popham*, 9 East, 408. *Filmer v. Gott*, 4 Bro. P. C. 234, 2d edit. *Rex v. Mattingley*, 2 T. R. 12. *Rex v. Olney*, 1 M. & T. 387. *Doe d. Chandler v. Ford*, 3 Ad. & El. 649. On the same principle, in an action for the price of goods, a defendant may show that the plaintiff sold them to the defendant for the purpose of being smuggled, and that he participated in the illegality, by agreeing to pack, and packing them in a particular manner, to facilitate the smuggling. *Biggs v. Lawrence*, 3 T. R. 454. *Waymell v. Read*, 5 T. R. 600. *Catlin v. Bell*, 4 Campb. 183, and that such was the consideration, would be a good defence, though the contract were in writing, and imported to be a legal transaction. See *Pellecat v. Angel*, 2 C. M. & R. 311, where the action was on a bill of exchange, and the principle was not disputed, but the facts, it was held, did not amount to a participation by the plaintiff in the illegality; and see *infra*, p. 761, note (1).

(2) 8 T. R. 147. These declarations of the testator as to his intentions, are admissible in evidence where the validity of the will is disputed on the ground of fraud, circumvention, or forgery. *Doe v. Hardy*, 1 M. & R. 525.

that in answer to an inquiry made by the testator, at the time of the execution, whether the contents of the will were the same as those of a former will, the answer was in the affirmative, when in fact the contents were different. So, where indentures or other writings are not available in evidence, unless the consideration paid or contracted for is truly stated, it may be proved, that a greater sum than is mentioned was actually paid, or that the writing does not contain the whole of the agreement, but that some of the terms of the agreement were omitted, for the purpose of evading the provisions of the stamp acts.

Illegal transaction.

Where the question is, whether a sum of money has been paid, which by statute is made requisite, (as the consideration of a purchase of an estate, in order to confer a settlement,) evidence is admissible to shew that less was paid than the sum expressed in the deed of conveyance. (1)

So, where the question was, whether the provision of the annuity act, which avoids an annuity deed unless it is enrolled, had been since complied with, and it was contended that the act did

(1) *Rex v. Mattingley*, 2 T. R. 12. *Rex v. Olney*, 1 M. & S. 387. In neither of these cases could any question of estoppel, by the statement in the deed of the consideration, have arisen, for the questions of the legality of the circumstances, arose between other parties. It is apprehended however, that the position in the text is correct, if a statute were violated, though these authorities would not warrant it if the question arose between parties to the instrument. The same observation applies to the cases of *Rex v. Northwingfield*, 1 B. & Ad. 912. *Rex v. Llangunnor*, 2 B. & Ad. 616. *Rex v. Cheadle*, 3 B. & Ad. 837, and *Rex v. Wickham*, 2 Ad. & El. 517. *Rex v. Northwingfield* and *Rex v. Llangunnor*, were decided on the authority of the two cases first mentioned, and they were cited in *Rex v. Cheadle*, in which the question between the contending parishes being, what was the real consideration paid in the purchase of an estate, it was decided, as in the other cases, that parol evidence was

admissible, notwithstanding the statement in the deed; and Lord Tenterden said, "the objection is, that evidence to contradict the statement of the consideration in the deed ought not to have been admitted. Now the parties to the deed might be estopped by it from saying, that this was not a purchase for a money consideration, but the parish officers who are strangers to it are not;" and Parke, J., said, "It is quite clear, that although the parties to this deed were estopped by it, strangers were not, and, consequently, the parish officers might shew the real nature of the transaction." The case of *Gaunt v. Wainman*, 3 Bing. N. C. 69, lays down the same principle. The case of *Rex v. Laindon*, 8 T. R. 379, may, it seems, be referred to the same class as the previous cases, though it may probably also, be supported as a case of the admission of parol evidence of a collateral fact, to shew the meaning of an instrument. All these cases rest on the doctrine of estoppel.

Illegal transaction.

not apply to the case, on the ground that the deed came within an exception of the act, as being a grant of an annuity secured on premises of greater value than the annuity, it was held, that a covenant by the grantor, that the premises were of greater value than the annuity, did not preclude him from shewing that they were of inferior value. (1) In these and similar cases, the

(1) *Doe d. Chandler v. Ford*, 3 Ad. & El. 649. There was a question made, whether a covenant would have been an estoppel in any case, but the court gave no opinion upon that, assuming, for the purpose of their judgment, that it was an estoppel.

The rule that a party may shew the real nature of a transaction in the cases above mentioned, must be understood to apply only where the assistance of the law is sought to enforce a transaction, which its policy condemns. Where the transaction has been acted on, a party to a fraudulent or illegal transaction will not be allowed, by the allegation of his own iniquity, to recover back what, in pursuance of an illegal bargain, he had delivered to the other; to such a case the maxim applies *in pari delicto potior est conditio defendentis*. In the case of *Doe dem. Roberts v. Roberts*, 2 B. & Ald. 369, it was held, in an action of ejectment to recover premises which the defendant's deed purported to have been conveyed for a valuable consideration, that the defendant could not set up, that the conveyance was made in order to confer a colourable qualification to kill game, and so to defeat an information which had been preferred against the plaintiff for shooting without a license. (See the facts as stated in the judgment of Best, J.) The deed must, it seems, have been ante-dated, and the transaction amounted to a conspiracy to defeat a legal proceeding. Lord Tenterden cited the observation of Lord Mansfield in *Montefiori v. Montefiori*, (1 Bl. 364), that "no man shall set up his own iniquity as a defence, any more than as a cause of action," a proposition, which is indisputable as against an innocent party. But

where a contract or deed is made for an illegal purpose, whatever may be stated in it, a defendant, against whom it is sought to be enforced, may shew the turpitude of both himself and the plaintiff, and a court of justice will not give its aid to enforce a contract springing from such a source; *ex turpi causa non oritur actio*. The decision of *Montefiori v. Montefiori* would come within this principle, for that cause decided only that a party who had given a note to the defendant, in collusion with him to falsely represent the amount of his property, in order to effect a marriage, could not recover the note back; and all the observations of Lord Mansfield have relation to the circumstance, that an innocent party, the wife, was in truth the party against whom the plaintiff sought to set up the iniquity of the transaction; and that, in that point of view, he cannot do so, is well settled in Courts of Equity. See *Neville v. Wilkinson*, 1 Bro. Ch. C. 546. Even considering *Doe v. Roberts* only as a conveyance to give a party a colourable qualification, both parties having that object in view, it seems opposed to principle, and the authority of several decided cases. In that point of view, the object was to defeat a statute which required a man to be possessed of a certain property before it conferred upon him a particular privilege. In *Gale v. Lindo*, (1 Vern: 475) a woman, wishing to contract a marriage, prevailed upon her brother to advance her 160*l.* to make up her portion, and gave him a bond for the amount; the marriage was afterwards had, the husband died the wife surviving, and on the brother's attempting to put the bond in suit against the representative of the wife, he was restrained by in-

general reason against admitting parol evidence will not apply; the rejection of such evidence would enable a party to defeat the objects of the law.

In an action on a bond, a party will not be permitted to show a condition, different from that expressed in the bond; and a conveyance cannot be averred by parol to be to another use or intent than that expressed in the conveyance. But there is a difference in this respect between an use and a consideration. It is an established rule, that a party may aver another consideration, which is consistent with the consideration expressed; but no averment can be made contrary to, or inconsistent with, that expressed in the deed. (1) Thus if a deed of bargain and sale is expressed generally to be made "for divers good consider-

Proof of another consideration.

junction, and the bond set aside; there the wife (that is, her personal representative,) prevented a Court of Law from acting, by the allegation of her own fraud, as well as that of the plaintiff. With respect to this case, it should seem, that the Court of Equity ought not to have given its assistance to either party, and a Court of Law acting on the same principle, the bond could not have been enforced. Where a bill was filed for the purpose of having a re-conveyance of a qualification, which had been given by the plaintiff to his son to enable him to sit in Parliament, the purpose being answered, the bill (said Lord Eldon, in *Curtis v. Perry*, 6 Ves. 747) was very properly dismissed by Lord Kenyon with costs. In *Platamone v. Staple*, (Coo. Ch. Cas. 252), a bill was filed under similar circumstances, except that the defendant never became a candidate for a seat in Parliament, and on that ground it was distinguished by Sir T. Plumer, from the case cited by Lord Eldon, "There was no ground, therefore," said he, "against the plaintiff's equity upon the statute, as a fraud upon the law, or as being against public policy." *Doe v. Roberts* was decided in 1819. In 1820, in *Brackenbury v. Brackenbury*, (2 Jac. & W. 391,) in a similar case of a bill filed to compel a defendant to return a conveyance to give such

a colourable qualification, Lord Eldon intimated an opinion, that a Court of Equity ought not to give either party any assistance. That the estate (in *Doe v. Roberts*) did not pass by the conveyance, so as to make the case resemble that, where a party endeavours to recover back what he had paid in execution of an illegal contract, is shewn by the case of *Doe v. Ford*, *supra*. The action of ejectment, in the former of these two cases, called for the assistance of a Court of Law to enforce a deed, which was a fraud upon the intention of the law, to which fraud both the plaintiff and the defendant were parties and privies. In a recent case, however, of *Lord v. Wardle*, 3 Bing. N. C. 684, the Court of Common Pleas seems to have inclined to the opinion, that by a deed like that in *Doe v. Roberts* the land passed; in argument, reliance seems to have been placed on a sort of estoppel *in pais*, that the defendant, having used the deed before a magistrate to shew a qualification, was estopped from saying that the land did not pass. The principal point above alluded to, was not discussed in this case.

(1) 2 Roll. Abr. 786. (N.) pl. 1. *Mildmay's case*, 1 Rep. 176. *Lord Cromwell's case*, 2 Rep. 76. *Bedell's case*, 7 Rep. 38. *Willes*, 677. 17 Ves. 192.

ations," it may be averred, that the bargainee gave money or other valuable consideration. (1) That such an averment may be taken, which stands with the deed, says Lord Coke, although it be not expressly comprised in the deed, is proved by the case of *Villers v. Beamont*, (2) where the consideration in a deed of bargain and sale of lands was stated to be a sum of money, but it was averred and found by the jury, that the indenture was made "as well in consideration of marriage (to make it a jointure in bar of dower) as of the said sum of money;" and it was adjudged, that, although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it.* *A fortiori*, adds Lord Coke, the averment may be made, where no consideration is mentioned, but the deed is general, "for divers good considerations;" for then the averment (that the bargainee gave money, &c.) is but an explanation and particularising of the general words of the deed, which include every manner of consideration;

- (1) 2 Roll. Abr. 786, (N.) 1 Rep. 176. case, 4 Rep. 3. S. P. And see *Craythorne v. Swinburne*, 14 Ves. 170.
 (2) 2 Dyer, 146, a. Vernon's

* In the case of *Villers and Beamont*, above cited, (2 Dyer, 146, a.) an elaborate argument is to be found in support of the position, that "where a consideration is expressed in a deed of gift or grant, no other cause can be averred; but, if no cause is expressed, that a cause may then be averred out of the deed." The Report adds, "that three Judges argued to the contrary, and that the effect of that which is found by the assignment of, 'as well in consideration of the said marriage, &c. as of the sum,' &c. is contained within the indenture, and so their finding is not contrary to it." In the case of *Peacock v. Monk*, (1 Ves. 128,) Lord Hardwicke makes the same distinction. A bill in that case was filed, claiming the benefit of a trust under a deed, and the point was, whether the plaintiff could prove a valuable consideration, as no consideration was expressed in the deed. Lord Hardwicke held, that the proof ought to be read. "It differed," he said, "from the common case, upon which the objection is founded; for, to be sure, where any consideration is mentioned, as of love and affection only, if it is not said also, 'for other considerations,' you cannot enter into proof of any other; the reason is, because it would be contrary to the deed: for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. But this is a middle case, there being no consideration at all in the deed." All the authorities agree, that, where the deed is not impeached for fraud or other illegal matter, no consideration can be averred or proved contrary to that expressed in the deed; and further, the cases referred to in the text appear to have established, that it is not considered to be contrary to or inconsistent with a deed, to prove another consideration in addition to the consideration expressed.

and in all these cases, the matter so averred is traversable and issuable. And Lord Hardwicke has held, that where no consideration is expressed in the deed, a party claiming the benefit of a trust under the deed may prove a valuable consideration. (1)

But although a party, who impeaches a deed for fraud, may prove a different consideration, the party, charged with the fraud, will not be allowed to prove any other consideration in support of the instrument. Thus, where a bill was filed to set aside, as fraudulent, a conveyance, expressed to be made in consideration of an annuity, and on the part of the defendants it was objected, that the grantor of the estate had often declared, "he would rather that his kinsman, one of the defendants, should have the estate in consideration of this annuity, than any other person for a more valuable consideration, and that he was willing to give the premises to his kinsman;" the Master of the Rolls, after stating, that the deed and the answer had put the defence on another ground, declared, that it would be of mischievous consequence, and liable to the danger of perjury, which the Statute of Frauds intended to prevent, to suffer parol evidence to prove blood and kindred to have been the consideration of this conveyance. (2)

As a deed takes effect from the time of delivery, not from the time of the date, it may be proved to have been delivered either before or after the day, when it purports to have been made. In an action of debt upon a bond, the plaintiff may declare on a bond bearing date on a certain day, and prove the delivery on another day; (3) or may state in his pleading, that the deed was indented, made, and concluded, on a different day, from that on which the deed itself professes to have been indented and concluded. (4)

Proof of delivery of deed at a different time.

In cases where a legal obligation is contracted by matter in writing between the parties, whether under seal or not, parol evidence is inadmissible to contradict the expressed

Proof of customary right not expressed in a writing.

(1) *Pearock v. Monk*, 1 Ves. 128.
 (2) *Clarkson v. Hanway*, 2 P. Wms. 203. 2 Schoal. & Lef. 501.
Dee dem. Roberts v. Roberts, 2

Barn. & Ald. 368.
 (3) *Goddard's case*, 2 Rep 4, b.
 (4) *Stone v. Bale*, 3 Lev. 348.
Hall v. Cazenove, 4 East 477.

Proof of customary right not expressed in a writing.

terms. But though an instrument appears, on its face, to be the sole exposition of the intention of the parties, and to be a complete instrument in all its parts, and though, in general, parol evidence is inadmissible to add to such an instrument, yet evidence of a custom regulating the matter, to which the instrument relates, may be admitted to "annex incidents"(1) to it, though no allusion to any custom be made in the writing, provided the custom be not inconsistent with it.(2) It has been long settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible, to annex incidents to written contracts, on matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established; and this has been done on the principle of a presumption, that in such transactions, the parties did not mean to express in writing the whole of the contract, by which they intended to be bound, but to make a contract with reference to these known usages.(3)

This rule with respect to leases is now established by a series of decisions, and the relation between landlords and tenants has been long regulated by the supposition, that all customary obligations, not altered by the contract, nor inconsistent with it, remain in force. Thus it may be shewn, that a heriot is due by custom on the death of a tenant for life, though not expressed in the lease.(4) And a lessee by deed may be entitled to an away-going crop by the custom of the country, though no such right is reserved by the deed. This was determined in the case of *Wigglesworth v. Dallison*, (5) which was an action of trespass for cutting down corn, which the plaintiff claimed as his away-going crop after

(1) *Hutton v. Warren*, 1 M. & W. 466.

(2) *Ibid.* "If any condition is found in the lease, necessarily repugnant to or inconsistent with the custom, the latter is excluded, for it can only be called in aid, where the former is silent upon the subject." By Tindal, C.J., in giving the judgment of the Court in *Holdring v. Pigott*, 7 Bing. 474. "There is no doubt that, by a special covenant, a party may waive the benefit of the custom of the coun-

try." By Lord Tenterden in *Webb v. Plummer*, 2 B. & Ald. 749.

(3) By Parke, B., in delivering the judgment of the Court in *Hutton v. Warren*.

(4) *Per Cur.* in *White v. Sayer*, Palmer, 211.

(5) 1 Doug. 201. This judgment was affirmed in the Exchequer Chamber. As to this case, see *Hughes v. Gordon*, 1 Bligh. 287, and *Clinan v. Cooke*, 1 Schoal. & Lefr. 22.

the expiration of a lease by deed. The jury found the existence of the custom, and it was afterwards moved, in arrest of judgment, that such a custom was repugnant to the deed; and to that effect a case was cited, which had been determined ten years before by Mr. Justice Yates. But the Court of King's Bench held, that the custom was not repugnant. They considered such a customary right as consequential to the taking, in the same manner as a heriot may be due by custom, though not mentioned in the grant or lease. The right was entirely collateral, and not excluded by the deed, which contained no stipulation whatever applicable to the subject.

Proof of customary right not expressed in a writing.

The principal difficulty, in the cases that have come before the Courts, has been to determine, what is such an expression of the intention as to exclude evidence of the custom as inconsistent with, or repugnant to it.

In *Wigglesworth v. Dallison*, (1) where the tenant was allowed an away-going crop, the lease was entirely silent on the subject of such a right; and Lord Mansfield said, that the custom did not alter or contradict the lease, but only superadded something to it. In *Senior v. Armitage*, (1) evidence was admitted of a customary right to a compensation for an away-going crop, though the instrument of demise contained an express stipulation, that all the manure made on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude, by implication, the tenant's right to receive a compensation for seed and labour. (2)

Wigglesworth v. Dallison.

(1) Holt, N P. C. 197.

(2) *Per Cur.* in *Hutton v. Warren*. *Senior v. Armitage*, was tried twice, the first time before Bayley, J., who nonsuited the plaintiff, on it's appearing that there was a written agreement between the parties. The Court afterwards set aside the nonsuit, holding according to a manuscript note of the case of that learned judge, that though there was a written contract between landlord and tenant, the custom would be still binding, if not

inconsistent with the terms of such written contract. But the Court of Exchequer, in *Hutton v. Warren* said, that the printed report of *Senior v. Armitage*, stated the case too strongly, in saying that the Court held the custom to be operative, "unless the agreement in express terms excluded it," and that probably it was not quite accurate in attributing a similar opinion to the Lord Chief Baron Thompson, who presided on the second trial.

Proof of customary right not expressed in a writing.

In *Webb v. Plummer*, (1) there was a claim of a customary allowance for foldage (a mode of manuring the ground,) but the Court held that there being an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded.

Holding v. Pigott.

In *Holding v. Pigott*, (2) a lease contained stipulations, limiting the quantity of grain that should be grown on the farm, and directing that the wheat land should be summer-fallowed, and that the tenant should spend all the fodder, hay, straw, turnips, &c. on the premises; it was held, that the custom of the country, which would give the tenant a right to the away-going crop of wheat after a crop of turnips, was not excluded, though such crop had been grown in violation of the covenant to leave the land summer-fallowed. The Court said these were stipulations as to the terms of holding, and not as to the terms of quitting.

Roberts v. Barker.

In *Roberts v. Barker*, (3) the tenant claimed compensation for manure left on a farm under a custom, which bound the away-going tenant to leave the manure, and under which he was entitled to be paid for it by the landlord, or the incoming tenant. The lease contained a condition, that the manure should not be sold or taken away, but should be left, to be expended on the land by the landlord or incoming tenant. Lord Lyndhurst, in delivering the judgment of the Court that the custom of the country was excluded, said, "if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as by the custom the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part."

Hutton v. Warren.

In the case of *Hutton v. Warren*, (4) the plaintiff held under a lease the glebe land and the tithes of a parish; the lease con-

(1) 2 B. & Ald. 746.
(2) 7 Bing. 465.

(3) 1 Cr. & M. 808.
(4) 1 M. & W. 465.

tained a stipulation, that the plaintiff should spend and consume three parts in four of the manure, arising from the tithes as well as from the glebe land, on the glebe, and leave on the land all the manures not spread or bestowed on the premises, for the use of the landlord, he paying a reasonable price for the same. It was held, that the custom of the country, giving an away-going allowance for seed and labour, was not excluded. Parke, B. in delivering the judgment of the Court, said, "the question is whether, from the terms of the lease, it can be collected that the parties intended to exclude the customary obligation for seed and labour." The Court considered the stipulation, obliging the tenant to lay out the manure arising from the tithes, as imposing a new obligation on the tenant, *dehors* the custom, and as qualifying the obligation by an engagement on the landlord's part to give a remuneration by repurchasing a part of the produce in a particular way. "It is by no means," said the Court, "to be inferred from this provision, that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the ploughing; or to plough, sow, and manure, he being paid for the manuring; the principle of *expressum facit cessare tacitum*, which governed the decision in *Webb v. Plummer*, would have applied; but this is not the case here. The custom of the country, as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been paid for that which the custom required him to spend."

Proof of customary right not expressed in a writing.

In commercial transactions, there are many cases in which evidence of custom and usage have been admitted to annex incidents to a written contract. (1) Thus, where an insurance

(1) See the cases cited *supra*, been admitted to interpret a contract. 739, in which such evidence has

was on a ship from London to the East Indies, warranted to depart with convoy, the Court held, that this clause of warranty must be construed according to the usage among merchants; that is, from such places where convoys are to be had, as from the Downs. (1) So, where the insurance is on goods till landed, and the defence is, that the plaintiff has been guilty of unreasonable delay in landing, the question can only be decided by knowing the usual practice of the trade, with which every underwriter is supposed to be acquainted, whether the practice has been recently or long established. (2)

On this principle, though the ordinary interpretation of an open policy of insurance would be, that it was merely to secure to the assured a bare indemnity, it has been held that evidence may be admitted to control it, by shewing a custom of merchants, that the assured should recover the gross freight, not deducting the charges for seamen and other expences. (3)

This doctrine of admitting evidence of usage to explain and construe mercantile contracts is strongly illustrated by the case of *Cutter v. Powell* (4), which was an action of assumpsit brought by an administratrix for work and labour done by the deceased. It appeared that the captain of a ship had given a note to the deceased, by which he promised to pay a sum of money to the deceased, provided that he proceeded on a voyage, and continued to do his duty as second mate, to the port of destination. The second mate died on the voyage, and the question was, whether the plaintiff could recover in this general action any portion of the wages for the time the deceased had served. An inquiry had been made by the direction of the Court relative to the usage of merchants on this kind of agreement; but no settled usage could be ascertained one way or the other. Lord Kenyon, in delivering his opinion, after stating that the deceased stipulated to receive the larger sum, if the whole duty were performed, and, unless the whole were per-

(1) *Lethulier's case*, 2 Salk. 443. 503.

(2) *Noble v. Kennoway*, 1 Dong.
510. *Vallance v. Dewar*, 1 Campb.

(3) 1 Bing. 61.

(4) 6 T. R. 320.

formed, to receive nothing, added, that on this particular contract his opinion was at present formed ; at the same time, said Lord Kenyon, if we were assured, that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my opinion. And Mr. Justice Lawrence said, " With regard to the common case of an hired servant, to which this has been compared, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he does not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage, that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, the plaintiff cannot recover any thing."

In these cases, as well as in those before mentioned, and in every other similar case, the rule for admitting such evidence of usage must be taken with the qualification, that the evidence proposed is not repugnant to or inconsistent with the contract. Therefore, in an action on a policy of insurance, " on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence having been admitted, that by the custom of the trade the risk on the goods, as well as on the ship, expired in twenty-four hours, the Court of King's Bench granted a new trial on that ground, and on the new trial the evidence was rejected. (1) Evidence of usage of trade, which contradicts the express words of a contract, is clearly inadmissible. (2)

It has been doubted by judges of the highest authority, (3) whether the admission of evidence of custom and usage to inter-

Parol evidence to add to written instruments.

(1) *Parkinson v. Collier*, Sitt. after Mich. 1797, Park. Insur. 416.

(2) *Yeates v. Pim*, 2 Marshall, Rep. 141 ; *Holt*, N. P. C. 95. S. C.

Blackett v. Royal Exchange Assurance Company, 2 Cr. & J. 244.

(3) By Lord Eldon, in *Anderson v. Pilcher*, 2 B. & P. 168, and see *Lethulier's case*, 2 Salk. 443.

pret, and annex incidents to written instruments, is not contrary to sound policy. Its admissibility, however, is now too well settled to be questioned; and, indeed, if the matter were *res integra*, it would be difficult to reject it on principle; a writing must have effect with reference to the general law of the land, and the only difference, between taking that general law and a custom in connexion with the writing, is that the latter is a binding law only on particular places, persons, or things; (1) and the qualification of the rule by the principle *expressum facit cessare tacitum* applies as well to an addition sought to be made to a contract by the general law, as by the special law. *Quilibet potest renunciare juri pro se introducto*. (2) The principle, upon which evidence of usage is admitted, distinguishes this class of cases from those in which it is sought, by contemporaneous parol evidence of facts, to add terms to a writing. The state of facts, in which this question may arise, may be considered with reference to a case in which a contract, or other instrument, appears to be complete on the face of it; and secondly, with reference to those cases in which it appears, on the face of a written instrument, that the parties could not have contemplated that it should express all the terms of their agreement.

With respect to cases, in which the instrument appears on the face of it to be complete, it seems that it may be laid down as a general rule, applicable as well to cases in which a written instrument is required by law, as to those in which it is not required, that parol evidence is inadmissible to shew terms upon which the instrument is silent. (3) Where

(1) A custom, in the intendment of law, is such an usage as has obtained the force of law, and is, in truth, a binding law upon the particular place, persons, and things, which it concerns, and such a custom cannot be established by grant of the king, (49 E. 3,) nor by act of Parliament. It is *jus non scriptum*, and made by the people only of the place where the custom exists. For where the people find an act to be good and beneficial,

and apt and agreeable to their nature and disposition, they use and practise it from time to time, and thus, by frequent iteration and multiplication of this act, a custom is made, and, being used from time whereof memory runs not to the contrary, obtains the force of a law. Davis, 31 b. 32 a. *Le case de Tanistry*.

(2) 2 Inst. 183. *Conventio vincit legem*.

(3) *Greaves v. Ashlin*, 3 Campb.

the rent for a house was specified in a written agreement to be twenty-six pounds a-year, and the landlord, in an action for use and occupation, proposed to show by parol evidence, that the tenant had also agreed to pay the ground-rent, the Court refused to admit the evidence. (1)* So, where a tenant, having paid the land-tax, brought an action to recover it back from his landlord, and gave in evidence a written memorandum of agreement in the plaintiff's handwriting, which specified the rent and terms, but was silent respecting the payment of taxes; the defendant offered parol evidence, that, previously to the drawing up of the memorandum, it had been mentioned, and was understood by the parties, that the rent was to be paid clear of all taxes: this evidence was rejected, and the Court of Common Pleas afterwards, on a motion for a rule to show cause, why the verdict should not be set aside, adjudged the evidence to be inadmissible, and refused the rule. (2)

426. *Williams v. Jones*, 5 B. & C. 108, and see *Parteriche v. Powlet*, 2 Atk. 384, where Lord Hardwicke said, "to add any thing to an agreement in writing, by admitting parol evidence which would affect lands, is not only contrary to the Statute of Frauds, but to the rule of common law, before that statute was in being." The same principle is laid down by the Court in giving judgment, in *Goss v. Lord Nugent*, 5 B. & Ad. 64, "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time

that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary, or qualify the written contract." See also *Harvey v. Grabham*, 5 Ad. & El. 61. As to the question, what is the consequence of an omission to mention certain terms, which were either agreed upon, or in respect of which no agreement was made,—and what is a sufficient statement of such agreements to satisfy the Statute of Frauds, See *Elmore v. Kingscote*, 5 B. & C. 583. *Acebal v. Levy*, 10 Bing. 376. *Hoadley v. M'Laine*, *id.* 482.

(1) *Preston v. Merceau*, 2 Black. 1249.

(2) *Rich v. Jackson*, 4 Bro. Ch. C. 515. 6 Ves. 334, n. S. C.

* In the case of *Preston v. Merceau*, above cited, Mr. Justice Blackstone, after stating that the Court could neither alter the rent nor the term, the two things expressed in the agreement, is reported to have added, "that, with respect to collateral matters, it might be different; the plaintiff might shew, who was to put the house in repair, or the like, concerning which nothing is said." But this opinion is not consistent with the principle established in *Meres v. Ansel*, (3 Wils. 275). *Rich v. Jackson*, (4 Bro. Ch. C. 515). *Powell v. Edmonds*, (12 East, 6), and several other cases above mentioned.

Upon the same principle, the verbal declarations of an auctioneer at the time of sale are not admissible in evidence, for the purpose of varying, or adding to, or explaining the printed conditions of sale. (1) Thus, where the conditions described only the number and kind of timber trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action for not completing his purchase according to the conditions, was not allowed to prove, that the auctioneer at the sale had warranted the quantity of timber to amount to a certain weight, and the Court of King's Bench was of opinion, that this evidence had been properly rejected. (2) Lord Ellenborough said, "the purchaser ought to have had it reduced into writing at the time, if the representation, then made as to the quantity, swayed him to bid for the lot. If the parol evidence were admissible in this case, in what instance might not a party by parol testimony superadd any term to a written agreement?—which would be setting aside all written contracts, and rendering them of no effect. There is no doubt that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of sale."

Parol evidence where writing appears incomplete.

Where, however, a writing evidently appears to express only some parts of an agreement entered into between the parties, parol evidence, it seems, would be admissible to prove the other parts of the agreement on which it is silent; as, for example, if there were a written order to make a chattel, parol evidence would be admissible of the acceptance of the order, and of the price, at which the other party agreed to make it. (3) In the case of *Jeffery v. Walton*, (4) an action was brought against the defendant for not taking proper care of a horse he had hired of the plaintiff; at the time of the hiring, the follow-

Jeffery v. Walton.

(1) *Gunnis v. Erhart*, 1 H. Bl. 289. *Jenkinson v. Pepys*, cited 6 Ves. 330. *Higginson v. Clowes*, 15 Ves. 516. *Clowes v. Higginson*, 1 Ves. & Beam. 524. *Winch v. Winchester*, 1 Ves. & Beam. 378. *Ogilvie v. Foljambe*, 3 Merivale, 53. *Shelton v. Livius*, 2 C. & J. 416. *Bradshaw v. Ben-*

nett, 5 C. & P. 48.

(2) *Powell v. Edmunds*, 12 East, 6.

(3) See *Ingram v. Lea*, 3 Campb. 521. At the time this case was decided, such a contract was not required by any statute to be in writing.

(4) 1 Stark. N. P. C. 267.

ing memorandum was made:—"Six weeks at two guineas, William Walton, junr." Lord Ellenborough held, that parol evidence was admissible, that the defendant, at the time of the hiring, agreed to be responsible for all accidents. Lord Ellenborough said, "The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion, that it is competent for the plaintiff to give in evidence suppletory matter as part of the agreement." (1)

It must be observed, that Lord Ellenborough considered this memorandum binding as an agreement as far as it went, holding it conclusive upon the terms of which it spoke. In the case of *Knapp v. Harden*, (2) in an action for goods sold and delivered, the defence was, that the credit had not expired; it appeared in evidence, that the plaintiff had written a letter to the defendant, specifying the price to be charged; it was sent to the defendant's surveyor, who communicated it to him: the defendant wrote to the plaintiff, that he consented to the terms proposed, if the payment should be made at a period he mentioned: the plaintiff consented, and the defendant then signed the first letter. (3) It was objected, that the first letter alone constituted the agreement, and that the evidence of the second letter, and of what passed in relation to it, were inadmissible. The objection having been overruled, the defendant had a verdict, and on a motion for a new trial the Court of Exchequer refused a rule, and Parke, B., said, "It is quite clear, that the letter did not in itself constitute an agreement, it was not meant to be so by the parties." (4)

(1) The plaintiff had a verdict, which does not appear to have been questioned by any motion for a new trial.

(2) Exch. H. T. 1835, reported 1 Gale, 47.

(3) Alderson, B., appeared to have considered the signature as affixed merely for the purpose of identification, but if so, the party thereby admitted that it was in-

tended to bind him as to the terms expressed therein.

(4) And see *Reay v. Richardson*, 2 Cr. M. & R. 427, in which, on an application to a creditor to enter into a composition, he was requested to write down what he was willing to do; he afterwards wrote, "I hereby agree, on payment of 10s. in the pound, to give a full and complete discharge;" it was

Subsequent
variations of
terms.

When an existing written contract, or obligation upon the parties, is once proved, questions may arise as to the admissibility of evidence to shew that the parties have subsequently consented to vary it. Such evidence is not open to the objection which is made to contemporaneous parol evidence, namely, that it is offered in opposition to that written evidence, to which, by the policy of the law, a greater degree of weight is attached than to the uncertain and slippery memory of witnesses. In general such evidence of a subsequent alteration of the terms of a written agreement is receivable in evidence. Where, however, the parties have defined the terms by a writing under seal, (which must be taken to be made with great care and formality,) the policy of the law will not permit it to be altered by matter of a lower nature. (1)

The common law of England recognised only two modes of expressing the obligations made between parties—by deed, and by parol. Under the latter head are comprised not only oral stipulations, but also those which are made by writing not under seal; and the common law allows written contracts not under seal to be varied by parol, if the variation be made subsequent to the writing, and not offered as contradictory to it but consistent with it. (2)

Statute of
Frauds.

The statute law, particularly the Statute of Frauds, has introduced a considerable alteration, and made written evi-

held, that evidence of a contemporaneous conversation with the creditor was admissible, to shew the purpose for which the writing was given, and thereby make a valid agreement, by shewing it was intended to be submitted to the creditors.

(1) *Nihil tam conveniens est naturali æquitati, quam unumquodque dissolvi eo ligamine quo ligatum est.* 5 Rep. 26 a. 9 Rep. 79 b. 3 Lev. 234. Blake's case, 6 Rep. 44 a. Braddick v. Thompson, 8 East, 344.

(2) A simple contract, whether in writing or not, may be varied in

its terms by a subsequent parol agreement entered into before the breach of it, without any new consideration. Vin. Abr. Contract, 17, but after it is broken, it cannot be discharged without satisfaction, for by the breach there is a wrong done to the party, which the words cannot release without satisfaction; but before the breach, no injury was done to either party, nor any of them injured by such a discharge," *ib.* After a breach there must be a new consideration to set up a new agreement in substitution of the one that was broken.

dence necessary in certain cases, in order to guard against the frauds and perjuries to which oral evidence is always subject, and peculiarly so in those cases to which the statutory regulations apply.

It seems, it would now be considered to be the object of the statutes, which make writing necessary to the validity of certain contracts, that all oral evidence as to them should be excluded, and that they must be proved by writing only. (1)

In the case of *Goss v. Lord Nugent*, (2) it was decided *Goss v. Nugent*. upon this principle, that when a written contract had been entered into concerning land which was required by the Statute of Frauds to be in writing, parol evidence was inadmissible to shew, that some of the terms had been altered or dispensed with by a subsequent parol agreement. By an agreement in writing, the plaintiff contracted to sell to the defendant several lots of land for the sum of 450*l.*, and to make a good title to them, and 80*l.* was paid to him as a deposit. It was afterwards discovered, that as to one of the lots, a good title could not be made; and it was then subsequently agreed by the defendant, that he would waive the necessity of a good title being made as to that lot, and the plaintiff afterwards delivered possession of the whole of the lots to the defendant, which he accepted, but refused to pay the remainder of the purchase money; he relied upon the objection to the title. The Court, after taking time to consider, delivered an elaborate judgment, that the defendant was not bound by the parol evidence of one of the terms of the written contract. The Court said, "We think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract, which is sought to be enforced, must be proved by writing only. But in the present case, the written contract is not that which is sought to be enforced, it is a new contract which the parties have en-

(1) *Per Cur. Goss v. Lord Nugent*, 5 B. & Ad. 56.

(2) *Ibid.*

tered into, and that new contract is to be proved partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, is not a contract entirely in writing."

Harvey v. Grabham.

In the case of *Harvey v. Grabham*, (1) it was decided, that the same principle applies to a case in which oral evidence is offered to shew a variation of a part of a contract relating to an interest in lands, though that part "might have been good of itself without writing."

Total discharge of a writing by parol.

With the exception of the class of cases in which the common law has been varied by statute, the observations, above made as to a variation of a written contract, apply to a total dissolution of it. Where an instrument has been made under seal, it cannot be dissolved by matter of an inferior nature. But in general, when an obligation is not created by writing under seal, and is made merely by simple contract, it may, whether written or not, be totally dissolved, at any time before breach, by an oral agreement.

Contracts within Statute of Frauds.

As to those contracts, to the validity of which a writing is made necessary by the Statute of Frauds, it does not appear to have been expressly decided, though there seems to be little room to doubt, that oral evidence of a complete discharge of them is admissible.

Goss v. Lord Nugent.

In delivering judgment in the case of *Goss v. Nugent*, (2) the Court of King's Bench said, with reference to this point, "It is to be observed, that the statute does not say in distinct terms, that all contracts or agreements, concerning the sale of land, shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing; and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived, and

(1) 5 Ad. & El. 73.

(2) Cited *supra*, 775.

abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing. (1)

The former section of this chapter treats of the principles which govern the admissibility of parol evidence, for determining the effect of that which has been written; in this section, the admissibility of evidence in opposition to, or in conformity with it, has been considered. Throughout the whole, the policy of the law, which is manifestly founded in wisdom, trusts to the *written* expression of the intention of the parties, rather than to *oral* testimony, which may be more easily perverted.

(1) In the very recent case of *Harvey v. Graham*, 5 Ad. & El. 61, though, seeming to incline to the same opinion, the Court of King's Bench advert to *Goss v. Lord Nugent*, as a case in which this point was doubted.

END OF PART THE SECOND.

PART THE THIRD.

THE preceding chapters treat of the principles, on which evidence is admitted in our Courts of Justice ; it is now proposed to treat of certain practical rules, relating to the method of procuring evidence, and regulating the application of evidence to the questions in dispute.

The first chapter treats of the method of enforcing the attendance of witnesses ; and of obtaining the production and inspection of documentary evidence before the trial of a cause.

The second chapter treats of certain rules laid down by the Courts, for governing the reception of evidence at the trial of causes—of the practice as to the right of a party to begin—of questions which a witness may or may not be asked—and of the rules which restrict the range and extent of inquiry. This chapter will conclude with the consideration of bills of exception, and demurrers to evidence.

CHAPTER I.

SECTION I.

Of the Attendance of Witnesses.

The process which our courts of law have instituted for the purpose of compelling the attendance of witnesses, is the writ of subpoena *ad testificandum*. This writ commands the witness to appear at the trial, to testify what he knows in the cause, under the penalty of 10*l.* to be forfeited to the king. (1) And the stat. 5 Eliz. c. 9, s. 12, (which refers to the process of courts of record, for the attendance of witnesses, as process well known and then in use, (2), gives an additional remedy, by enacting, that "if any person (upon whom any process out of a court of record shall be served, to testify concerning any cause or matter depending there, and having tendered to him, according to his countenance or calling, such reasonable sum of money for his costs and charges, as, with regard to the distance of the place, is necessary to be allowed) do not appear according to the tenor of the process, not having a lawful and reasonable cause to the contrary, he shall forfeit for every such offence 10*l.*, and yield such further recompense to the party grieved, as, by the discretion of the judge of the Court out of which the process issues, shall be awarded."

If a witness has in his possession any deeds or writings, which are required at the trial, a special clause must be inserted in the subpoena, called a *duces tecum*, commanding him to bring them with him. When the writings are in possession of the adverse party or his attorney, notice should be given to produce them; and if, after proof of a reasonable notice, they are refused, secondary evidence of the contents will be

(1) See form of this writ, on a trial, in Tidd. App. p. 331; and on a writ of inquiry, p. 241.

(2) See 9 East, 484.

admitted. It will not be necessary to give notice to the defendant in person; giving it to his attorney will be sufficient even in penal actions. (1) This writ of subpoena *duces tecum*, as well as the other writ of subpoena *ad testificandum*, is compulsory upon the witness. And though it will be a question for the consideration of the judge at the trial, whether in any particular case the actual production of writings should be enforced, yet the witness ought always to have them ready to be produced, if required, in obedience to the judicial mandate. (2) From the earliest times, our Courts of Law, in order to give effect to their proceedings, have resorted to these compulsory measures for the production of evidence; measures obviously essential to the existence and constitution of Courts of Justice.

Regulations as to costs of proving documents.

Some rules have recently been made by the Courts to diminish the expense of proving written documents. By a rule of H. T. 2 W. 4, (3) it is ordered, "that the expense of a witness, called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy," and he shall have refused or neglected. A similar rule promulgated at the same time, (4) applies to the expense of a witness called to prove any written instrument stated upon the pleadings. In the latter case, however, a summons to admit the execution must be taken out before a judge, who has a power to give a party the right to his costs of such proof, not only if the party refuses to make an admission, but also if he does not think it reasonable to require it. Neither of these rules give any

(1) Attorney General v. Le Merchant, 2 T. R., 203, n. Cates q. t. v. Winter, 3 T. R. 306. See form of writ, Tidd. App. 332. And see further as to such notice.

(2) Amey v. Long, 9 East, 485. Field v. Beaumont, 1 Swanst. 209. If a witness who has been served with the writ of a subpoena, has delivered the papers, &c. to the op-

posite party, in fraud of the subpoena, who does not produce them, secondary evidence may be given of them, without giving a notice to produce. Leeds v. Cook, 4 Esp. 256.

(3) Reg. VI.

(4) Reg. VII. See the rule as to what the summons must state.

new right to costs; they merely restrict the right of the successful party to his costs, if he has not observed their provisions. A much more effectual provision, to diminish the expense of proving a document which a party improperly refuses to admit, is one which awards, as a penalty against him, the costs of the proof whatever may be the result of the trial: this is contained in the rules of H. T. 4 W. 4, altering materially the previous law of costs. The judges were empowered to make the latter rules by the stat. 3 & 4 W. 4, c. 42, s. 15. The effect of them is, that if a party, upon receiving notice of an intention to offer in evidence the written or printed documents described in the notice, shall refuse to do so, and a Judge, upon a summons taken out, shall think he ought reasonably to be required to admit them, he is subject to pay the costs of the proof made necessary by his refusal, whatever may be the result of the cause. (1) It is in the discretion of the Judge, before whom the summons is taken out, to give the costs of the application and inspection. (2) If the party, who produces the documents in evidence, shall not have required the other party to admit them, or if the Judge shall not, by indorsement upon the summons, have declared that he did not think it reasonable to require the admission of the writings, the costs of proof will not be allowed. (3) The admission of documents under these rules, merely dispenses with the necessity of proving them, and waives no right of objecting to the admissibility of them, when proved. (4)

The writ of subpoena, when sued out, is to be regularly served on the witness; and as only four witnesses can be included in one writ of subpoena, (5) several writs are frequently necessary. In order to save expense, it is settled, that service of a ticket, containing the substance of the writ, will be as

(1) Reg. H. T. 4 W. 4, reg. 20. See the rule and the form therein given for the description of the documents intended to be given in evidence.

(2) *Ibid.*

(3) *Ibid.*

(4) It is presumed that this is

quite clear upon the language of the rules; all doubt, however, is removed by the form of the notice given in the rules, which is to admit "saving all just exceptions to the admissibility of such documents as evidence."

(5) Cowp. 846.

When.

effectual as service of the writ itself. (1) The writ or ticket should be served personally on the witness, (2) and in reasonable time before the day of trial, that he may suffer the less inconvenience from his attendance on the court. (3) Notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too late. (4) It has been said, that if the witness, whose attendance is required, be a married woman, it will be necessary to serve the subpoena upon her personally, and the tender of the expenses should be made to her, and not to her husband. (5) If a cause appointed for one sitting be made a *remanet*, the subpoena must be re-sealed and re-served. (6)

Privilege from arrest.

Witnesses, as well as the parties in a suit, are protected by Courts of Justice, and privileged from arrest, during the necessary time consumed by them in going to the place where their attendance is required, in staying there for the purpose of such attendance, and in returning from the place. (7) And, in ordinary cases, it is not necessary for the protection of a witness, that he should have been served with a subpoena, if, upon application to him, he consented to attend without one. (8) A

For what time.

(1) *Goodwin v. West*, Cro. Car. 522, 540. *Maddison v. Shore*, 5 Mod. 355, S. P. See form of ticket on writ of inquiry, in Tidd. App. p. 241, and on trial, *ib.* p. 331.

(2) *Smalt v. Whitmill*, 2 Stra. 1054. *Wakefield's case*, Rep. temp. Hard. 313, S. P.

(3) *Hammond v. Stewart*, 1 Stra. 509.

(4) 2 Tidd. Pr. 806, 9th edit.

(5) This case of *Goodwin v. West*, Cro. Car. 522, 540; 1 Jones, 430, S. C. is usually referred to as the authority of this position, but in the report in Croke no such point appears, the service being stated to have been on the wife, and the tender of expenses made to her; in the report by Sir W. Jones, the facts are differently stated, *viz.* that the service and tender were made to the defendant in the suit for the penalty, and upon objection being

made, that the party ought to be served, the Court overruled it. The report in Sir W. Jones is inconsistent and unintelligible; the report in Croke shews that service and tender to the wife would be sufficient, and it is no authority for saying, that the service on the husband would be insufficient; it is evidently safer to pursue that course which has been held good, *viz.* to serve the wife with the writ, and tender her the expenses.

(6) *Sydenham v. Rand*, 24 G. 3, K. B., cited from MS. in 2 Tidd. P. R. 855.

(7) 2 Roll. Ab. 272. *Lightfoot v. Cameron*, 2 Black. Rep. 1113. *Meekins v. Smith*, 1 H. Bl. 636. *Randall v. Gurney*, 3 Barn. & Ald. 252.

(8) Lord Kenyon, C. J., in *Arding v. Flower*, 8 T. R. 536. 1 Tidd. Pr. 198.

reasonable time is allowed to the witness for going and returning; and in making this allowance the courts are disposed to be liberal. (1) This privilege has been extended to a party in the suit attending on an arbitration under an order of *nisi prius*, (2) or on the execution of a writ of inquiry, (3) and to persons attending the insolvent debtors' court. (4) A bankrupt, also, attending a meeting of commissioners in pursuance of a notice, and witnesses attending upon summons, are protected from arrest at the suit of a creditor. (5) And, by the mutiny-act, witnesses are privileged from arrest during their necessary attendance on courts martial, in the same manner as witnesses attending a court of law. A witness is not privileged from being arrested by his bail: the bail may take him, after he has finished his evidence, for the purpose of surrendering him. (6)

To whom.

A subpœna can have no effect, where the witness is in custody, or on board a ship under the command of an officer, who refuses to allow his attendance. The course, in such case, is to sue out a writ of *habeas corpus ad testificandum*; (7) for which purpose application ought to be made to the court or to a judge, upon affidavit of the party applying, stating that he is a material witness, and willing to attend. (8) Upon this application the court in its discretion will make a rule, or the judge will grant his

Habeas corpus ad testificandum.

(1) 2 Blac. Rep. 1113. Hatch v. Blisset, Gilb. Cas. 308, cited 2 Stra. 986. 13 East, 16, n. (a.) Willingham v. Matthews, 2 Marshall, Rep. 57. See Randall v. Gurney, 3 Barn. & Ald. 252, and 1 Tidd. Pr. 195, 9th edit., where the cases on this subject are collected. The subsequent cases are collected in Strong v. Dickenson, 1 M. & W. 490.

(2) Spence v. Stuart, 3 East, 89. Randall v. Gurney, 3 Barn. & Ald. 252.

(3) 4 Moore, 34.

(4) 6 Taunt. 356.

(5) 5 G. 2, c. 30, § 5. 6 G. 4, c. 16, s. 117. Arding v. Flower, 8 T. R. 534. 2 Blac. Rep. 1142. Kinder v. Williams, 4 T. R. 377.

Spence v. Stuart, 3 East, 39. *Ex parte* Byne, 1 Ves. & Beam. 316. 1 Tidd. Pr. 199.

(6) *Ex parte* Lyne, 3 Stark. N. P. R. 132. Lord Tenterden refused to discharge him on motion.

(7) Tidd. Pr. 858. *Ex parte* Tiltson, 1 Stark. N. P. C. 470. See form of affidavit in Tidd's App. c. 33, s. 37, p. 332.

(8) Rex v. Rodham, Cowp. 672. On the trial of Sir John Friend for high treason, Lord C. J. Holt, on the application of the prisoner, ordered his clerk to prepare a warrant for a *habeas corpus*, 4 St. Tr. 600, fol. ed. 13 Howell's St. Tr. 3. And see Layer's case, Fortesc. Rep. 396.

fiat for a writ, (1) which is then sued out, signed, and sealed. (2) The writ should be left with the sheriff or other officer, who will be bound to bring up the body, on being paid his reasonable charges. If the witness be a prisoner of war, he may be examined on interrogatories, but cannot be brought up without an order from the secretary of state. (3)

It has been doubted, whether persons in custody could be brought up as witnesses by writ of *habeas corpus*, to give evidence before any other courts except those at Westminster: 43 G. 3, c. 140. but now, by stat. 43 G. 3, c. 140, it is enacted, that a judge of either of the courts may, at his discretion, award such writ for bringing a prisoner, detained in any gaol in England, before a court martial, or before commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting by virtue of any royal commission or warrant. And the 44 G. 3, c. 102. stat. 44 G. 3, c. 102, authorizes the judges of the court of King's Bench, or Common Pleas, or Exchequer, in England or Ireland, or justices of oyer and terminer or gaol delivery (being such judge or baron), to award writs of *habeas corpus* for bringing prisoners detained in gaol before any of the courts, or any sitting at *nisi prius*, or before any court of record in these parts of the United Kingdom, to be there examined as witnesses in any civil or criminal cause. By the same act, justices of great sessions in Wales and the county palatine of Chester have the same authority within the limits of their jurisdiction. The application for a writ of *habeas corpus* under this statute ought to be made to a judge out of court. (4)

Payment of
expenses.

No witness is bound to appear in civil cases, unless his reasonable expenses, for going to and returning from the trial, and for his reasonable stay at the place, be tendered to him at the time of serving the subpoena; nor, if he appears, is he bound

(1) *Rex v. Burbage*, 8 Burr. 419.
1440.

(2) *Tidd. Pr.* 858.

(3) *Furley v. Newnham*, 2 Doug.

(4) *Gordon's case*, 2 Maule & Selw. 562.

to give evidence, till such charges are actually paid or tendered (1), except he reside within the weekly bills of mortality, and be summoned to give evidence within them, in which case it is usual to leave a shilling with the subpoena ticket. (2) The necessity of this previous tender arises from the special provision in the act of Elizabeth, before cited. If a necessary witness is brought over from a foreign country, whether brought after or before the commencement of an action, the reasonable expenses both of his coming to this country, and of his subsistence here pending the action, and of his return, will be allowed in the taxation of costs, provided he is brought over *bona fide* for the purposes of the particular action. (3) Now, however, as witnesses out of the jurisdiction of the Courts may be examined on interrogatories, it would seem, that a special ground must be shewn to entitle a party to the costs of bringing a witness from abroad. (4) With respect to compensation for loss of time, the general rule is, that it ought not to be allowed; (5) some compensation has been usually allowed to medical men and attornies, but not to others.

Foreign witness.

For loss of time.

If a witness, who has been duly served with the writ, and has had a tender of the reasonable expenses, omit to attend at the trial without a sufficient cause, he is liable to be proceeded against in one of three ways. The first and more usual course of proceeding is by attachment for a contempt of the process

Remedies for non-attendance.

Attachment.

(1) *Chapman v. Poynton*, 2 Stra. 1150. 13 East, 16, n. a. S. C. more fully stated. *Bowles v. Johnson*, 1 Blac. Rep. 36. *Fuller v. Prentice*, 1 H. Blac. 49. *Hallett v. Mears*, 13 East, 15. *Ex parte Roscoe*, 1 Merivale, Rep. 191.

(2) 3 Blac. Com. 369. Tidd. Pr. 856, 865.

(3) *Tremain v. Faith*, 6 Taunt. 88. 1 Marshall, 563, S. C. And; though a witness is not called on the trial, the Master may exercise a discretion in allowing his expenses, if there were reasonable ground for supposing his evidence would be admissible, and be required. *Rushworth v. Wilson*, 1 B. & C. 267.

(4) *Vide infra*, examination of witnesses on interrogatories.

(5) *Moor v. Adam*, 5 Maule & Selw. 156. *Willis v. Peckham*, 1 Brod. & Bingh. 515. *Lowry v. Doubleday*, 5 Maule & Selw. 159. (b.) *Severn v. Olive*, 3 Brod. & Bingh. 72. 6 Moore, 239. The legality of allowing, in taxation of costs, a compensation to any witnesses for loss of time, was doubted in *Collins v. Godefrey*, 1 B. & Ad. 957; and that case decided that an action can not in any case be maintained for such a compensation. The expenses of a witness in attending a trial are allowed, pursuant to a scale graduated according to his situation in life.

of the court, (1) which appears to be as ancient as the common law itself. (2) In order to ground this summary proceeding, it will be necessary to shew an ill motive in the witness, as negligence and inattention to the process of the court, and also to prove, that the witness was personally served (3) and that his reasonable expenses were paid or tendered at the time of the service of the subpoena. (4) Whenever a party is sought to be brought into contempt, it must be shewn affirmatively to the Court, that every thing has been done which was necessary to call for his attendance. (5) If it appear by the notes of the Judge of the trial, or upon affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. (6) It is not necessary, to make a witness liable for a disobedience of a subpoena, that the jury should have been sworn. (7) A second remedy is by a special action on the case for damages, at common law. (8) The third, and last, is an action on the stat. 5 Eliz. c. 9, s. 12, for the penalty of 10*l.*, and also for the further recompense recoverable under that statute. This action for a further recompense will not lie, unless the amount has been previously assessed by the Court, out of which the process issued; neither the jury nor the judge at *nisi prius* being competent to make the assessment. (9) When the assessment has been made, an action of debt will lie.

Action.

In criminal cases.

The means of compelling the attendance of witnesses in criminal cases are of two kinds; (10) first, by process of subpoena for disobedience, for which the person served with the process is

Subpoena.

(1) 2 Lord Raym. 1528. 1 Stra. 510. 2 Stra. 810, 1054, 1150. Cowp. 846. Doug. 561. Blandford v. De Tastet, 5 Taunt. 260. Horne v. Smith, 6 Taunt. 9. 1 Marshall, 410, S. C. Barrow v. Humphreys, 3 Barn. & Ald. 598.
 (2) See Pearson v. Iles, Doug. 561. Amey v. Long, 9 East, 483.
 (3) 2 Stra. 1054. Garden v. Creswell, 2 M. & W. 319.
 (4) *Ante*. p. 6. Tidd. Pr. 858.
 (5) Garden v. Creswell, 2 M. &

W. 319.

(6) Dicas v. Lawson, 1 Cr. M. & R. 934. In that case, Lord Brougham was the witness whose absence was complained of.

(7) Mullett v. Hunt, 1 Cr. & M. 752, overruling Bland v. Swaffham, Peake, N. P. C. 60.

(8) Pearson v. Iles, Doug. 561.

(9) *Ibid*.

(10) 2 Hale, P. C. 281. Bennet v. Watson, 3 Maule & Selw. 1.

liable to an attachment; (1) or, secondly, the justice or coroner, who takes the information of witnesses, may, at the time of taking it, or at any time before the trial, bind them over to appear, and, if they refuse to come or to be bound over, may commit them for a contempt. (2) This proceeding by recognizance is the ordinary and more effectual method. Recognizance.

In prosecutions for misdemeanors the defendant has been, from the earliest times, allowed the writ of subpoena. But prisoners have no right, by the common law, to this process in capital cases, without the special order of the court. (2) Formerly, in such cases, a prisoner was put upon his trial under a twofold disadvantage; he was unable to compel the attendance of witnesses, and, if they voluntarily attended, their evidence, not being given on oath, received less credit than the evidence on the part of the prosecution. (a) By stat. 7 W. 3, c. 3, s. 7, Subpoena for prisoner.
7 W. 3, c. 3. all persons indicted for any high treason, whereby corruption of blood may ensue, shall have the like process of the Court, where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them. And now, as the stat. 1 Ann. st. 1, c. 9, s. 3, 1 Ann. st. 1,
c. 9. enacts, that all witnesses, on behalf of a prisoner on a trial for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury, process of subpoena may be taken out by the prisoner in any case whatever.

In order to provide for the appearance of witnesses, to answer in cases where warrants are not usually issued, and to give

(1) *Rex v. Ring*, 8 T. R. 585. The subpoena in this case issued from the crown-office, requiring the witness to appear at the ensuing assizes in the country; and the Court of K. B. granted an attach-

ment. Disobedience to a subpoena issued by the Quarter Sessions is no contempt of that Court. *Rex v. Brownell*, 1 Ad. & E. 602.

(2) 4 Blac. Com. 359. 2 Hawk. P. C. c. 46, s. 17.

(a) Many instances occur among the early State Trials, of witnesses refusing to come into Court to be examined on behalf of the accused; and there are some, in which witnesses have been peremptorily sent out of Court by the judge, and not allowed to give evidence.

evidence in criminal prosecutions in any part of the United Kingdom, it is enacted by a late act of parliament, stat. 45 G. 3, c. 92, s. 3, and s. 4, that the service of a writ of subpoena or other process, in any one of the parts of the United Kingdom, shall be as effectual to compel his appearance in any other of the parts of the same, as if the process had been served in that part where the person is required to appear. And if the person served does not appear, the Court, out of which the process issued, may transmit a certificate of the default in the manner specified by the act, and the Court, (1) to which the certificate is transmitted, may punish the person for his default, as if he had refused to appear to process issuing out of that Court; provided it appear, that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence and of returning, was tendered to the person making default, at the time when the subpoena or other process was served upon him.

Compensation. In civil proceedings, as we have seen, a witness is not obliged to attend or give evidence, unless his expenses are duly tendered; but, in criminal prosecutions, witnesses are bound to appear unconditionally. (2) On the other hand, it is reasonable and highly expedient, that, when they attend on behalf of the public, a fair compensation should be given them for their trouble and necessary expense. Formerly, however, the law provided no means for reimbursing them; a defect in our judicial administration, which was at length remedied by stat. 27 G. 2, c. 3, s. 3. This statute enacts, that "when any poor person shall appear on recognizance to give evidence against another accused of grand or petit larceny or other felony, the Court may, on the oath of such person, and on consideration of his circumstances, in open Court order the treasurer of the county or place, in which the offence shall have been committed, to pay such sum of money as to the Court shall seem reasonable, for his time, trouble, and expense."

Costs in felonies.

27 G. 2, c. 3.

(1) This stat. is confined to cases where the witness making the default is out of the jurisdiction of the Court, to which the certificate is transmitted. *Rex v. Brownell*, 1

Ad. & E. 602.

(2) 4 *Hawk. b.* 2, c. 46. s. 173. 2 *Hale*, P. C. 282. See also preambles of stat. 27 G. 2, c. 3, s. 3, and stat. 18 G. 3, c. 19, s. 7.

As this statute extended only to poor persons who appeared on recognizance, and not to such as appeared on subpoena to give evidence, it was afterwards deemed reasonable by the legislature, that every person so appearing on recognizance or subpoena, should be allowed his reasonable expenses; and also, in case of poverty, a satisfaction for his trouble and loss of time. The stat. 18 G. 3, c. 19, s. 8, therefore enacted, "that 18 G. 3, c. 19.
 " where any person shall appear on recognizance or subpoena, to give evidence as to any grand or petit larceny or other felony, whether any bill or indictment be preferred or not to the grand jury, it shall be in the power of the Court, provided the person shall, in the opinion of the Court, have *bond fide* attended in obedience to such recognizance or subpoena) to order the treasurer of the county or division, in which the offence shall have been committed, to pay him such sum as to the Court shall seem reasonable, not exceeding the expenses, which it shall appear to the Court the said person was *bond fide* put unto by reason of the said recognizance and subpoena, making a reasonable allowance, in case he shall appear to be in poor circumstances, for trouble and loss of time."

The stat. 58 G. 3, c. 70, s. 4, provides, that, in cases of 58 G. 3, c. 70,
 felony, the Court, before whom a person shall be prosecuted^{s. 4.} or tried, shall be empowered (at the request of any person bound to prosecute, or subpoenaed to give evidence, and who shall appear to prosecute or give evidence, or who shall appear to the Court to have been active in the apprehension of a person accused of some one of the offences mentioned in several recited acts), to order the sheriff or treasurer of the county to pay to the prosecutor and witnesses, and to the person concerned in such apprehension, as well the costs, charges, and expenses, which the prosecutor shall be put to in preferring the indictment, as also such sum of money as to the Court shall seem reasonable and sufficient to reimburse them for their expenses in attending before the grand jury to prefer the indictment, and in carrying on the prosecution, and also to compensate them for the loss of time and trouble in the apprehen-

sion and prosecution. (a) The 8th section further provides, that no person shall be entitled to any such costs or expenses for attending the Court, unless he shall have been bound by recognizance, or have previously received a subpoena to attend, or a written notice for that purpose from the prosecutor, his agent, or his attorney.

7 G. 4, c. 64.

Costs of indictment.

Of attendance.

Before examining magistrate.

The statute of 7 G. 4, c. 64, s. 22, enacts, that the Court before which any person shall be prosecuted or tried for any felony, shall be authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpoena, to prosecute or give evidence against any person accused of any felony, to order payment to the prosecutor of the costs and expenses, which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sum of money, as to the Court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the Court, when any person shall, in the opinion of the Court, *bond fide* have attended the Court in obedience to any such recognizance or subpoena, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient to reimburse such person for the expenses, which he or she shall have *bond fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpoena, and also to compensate such person for trouble and loss of time; and the amount of expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in Court, if such magistrate or magistrates shall think fit to grant the same; and the

(a) The opinion of the judges, on the construction of this section, is stated in the Crown Circ. Comp. p. 10, 9th edit.

amount of all the other expenses and compensation shall be ascertained by the proper officer of the Court.

The act, last mentioned, gives authority also to the Court in certain cases of *misdemeanor*, to order the payment of the costs and expenses of prosecutions. This statute provides, that where any prosecutor or other person shall appear before any Court on recognizance or subpoena, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property, knowing the same to have been stolen; of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, or any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury; every such Court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are hereinbefore authorized and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall be lawful for the Court, where any person shall have *bond fide* attended the Court, in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: Provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate. The misdemeanor of concealing the birth of a child is brought within this statute by the recent act 1 Vict. c. 44. (1)

Costs in misdemeanors.

It has been doubted, whether a witness may not lawfully refuse to obey a subpoena on a criminal prosecution, as well as

(1) Provision is made for the expense of medical and other witnesses attending coroners' inquests

by the stats. 6 & 7 W. 4, c. 89, and 1 Vict. c. 68.

in a civil suit, unless he has a tender of his reasonable expenses; and the doubt is suggested in consequence of a provision in the stat. 45 Geo. 3, c. 92, which (after enacting, that service of subpoena of a witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear) provides, that he shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpoena, for defraying his expenses of coming, attending, and returning. One object, which the legislature had in view, was to provide for the appearance of witnesses in any of the parts of the United Kingdom, and they are therefore subject to punishment for non-attendance. On the other hand, as the expenses of going from one of the parts of the United Kingdom to either of the other parts would necessarily be great, they were allowed to insist on the payment of their reasonable charges, previous to the journey; a provision more especially necessary at the time of passing this statute, when, in some parts of the kingdom, witnesses were not entitled to any compensation for attending to give evidence in criminal cases. (1) But as there is no statute respecting a tender of expenses in the case of a criminal prosecution, except that mentioned above (which is confined to the case, where the process is served in one of the parts of the United Kingdom for the appearance of the witness in another of the parts), and as the tender of expenses in civil suits is under the special provision of an act of parliament, the general rule in ordinary cases (whether of felony or misdemeanor) appears to be, that witnesses, making default on the trial of criminal prosecutions, are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpoena; (2) although the court would have good reason to

(1) In Ireland, the expenses of witnesses in case of felony were first allowed by st. 55 G. 3, c. 91.

(2) See a MS. case cited in Burn's Justice, vol. 1, 1076, (by D'Oyly & Williams), in which a witness objecting to give evidence

until his expenses were paid, was compelled to do so by the judge. R. acc. Rex v. Cooke, 1 C. & P. 321. In the latter case, the indictment had been removed by *certiorari*, and the witness was called by the defendant.

excuse them for not obeying the summons, if, in fact, they had not the means of defraying the necessary expenses of the journey. (1)

Commissioners of bankrupt may summon any persons whom they believe capable of giving information concerning the trade, dealings, or estate of the bankrupt, &c., and if the witness does not come at the time appointed, they may order him to be apprehended. (2) Every witness summoned to attend before commissioners shall have his necessary expenses tendered to him, in the same manner as is required on service of subpoena to witnesses in actions at law. (3)

Commissioners
of bankrupt.

Magistrates out of sessions have not, in general, any authority to compel the attendance of witnesses for the purpose of a summary trial, except under the special provision of acts of parliament. When a statute requires justices of the peace to take the examination of persons bringing a prisoner before them on suspicion of felony, it incidentally gives them a power to examine upon oath, and to summon by their warrant any other persons, who appear to be material witnesses for the prosecution, to come before them and give evidence. And it may be laid down as a general rule, that wherever magistrates are authorized by act of parliament to hear and determine, or to examine witnesses, they have incidentally a power to take the examination on oath. (4)

Justices.

Witnesses, who neglect to attend on courts martial, after being duly summoned, are liable to be attached in the Court of King's Bench, &c., as if they had neglected to attend a trial in some criminal proceeding in that Court. (5) And commissioners of inclosure, under the general inclosure act, stat. 41 G. 3, c. 109, s. 33, 34, have a power to summon in writing any person within a certain distance, to appear before them and to

Courts martial.

Commissioners
of inclosure.

(1) See *ante*, p. 788.

(2) 6 G. 4, c. 16, s. 33.

(3) 6 G. 4, c. 16, s. 35.

(4) Dalt. Just. c. 6. Lamb. 517.
12 Rep. 131. And see stat. 15 G. 3,

c. 39, which gives such power, for the purpose of levying penalties or making distresses.

(5) Stat. 55 G. 3, c. 108, s. 28.

be examined: and if the person summoned refuse to appear, he will be subject to a penalty.

Arbitrators.

Where a reference to arbitration has been made by any rule of Court, or Judge's order of *nisi prius*, in an action, or in pursuance of an agreement to refer containing a clause that the submission may be made a rule of Court, the Court making such rule or order, or any judge may, by a rule or order command the attendance of any person to be examined as a witness, or the production of any document. (1)

Witness abroad.

Formerly when a material witness resided abroad, or was going abroad, and could not attend at the trial, the party requiring his testimony might have moved the Court in term-time, or have applied to a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse* before one of the judges of the Court, if the witness resided in town, or, if he resided in the country or abroad, before commissioners specially appointed and approved by both parties. (2) The rule or order for such examination could not have been obtained without the consent of both parties, as the depositions were only secondary evidence. Without this consent, therefore, the Court would not have given the plaintiff leave to examine upon interrogatories an attesting witness to a deed, or to give the examination in evidence at the trial, on the ground that the witness was incapacitated by illness from attending, and unlikely ever to be able to attend, though it appeared by affidavit, that the defendant had at one time admitted the execution of the deed; nor would the Court, on that ground, have granted a rule for dispensing with the attendance of the witness. (3) And though the Court would not have compelled the other party to consent, yet, if necessary, it would have assisted the party applying by putting off the trial (that there might have been an opportunity of filing a bill in equity,) until

Interrogatory act.

Order for examination.

(1) 3 & 4 W. 4, c. 42, s. XL. See the act for the requisites to be contained in the rule or order. Disobedience to a regular rule or

order will be treated as a contempt of Court.

(2) 2 Tidd. Pr. 860.

(3) Jones v. Brewer, 4 Taunt. 47.

the consent was obtained, or the witness returned; and if, after all, the defendant refused, the Court would not give him judgment as in case of a nonsuit. (1) When a party, after obtaining leave by consent, examined witnesses abroad on depositions, he would not have been entitled to any allowance, in the taxation of costs, for the expense of taking the depositions, although he might have succeeded in the action. (2) The same rule prevailed in the Court of Chancery; if a party applied to that Court for a commission to examine witnesses, he must have paid the expenses.

Costs of examination.

A partial remedy for the defects of the law was applied by the stat. 13 G. 3, c. 63, s. 40, 44, by which, where a cause of action arose in India, or an offence had been committed there, which it was intended to be tried in this country, the evidence upon interrogatories of witnesses resident in India may be obtained. (3) The evidence of witnesses in India may also be obtained, in support of a bill for a divorce in parliament, by the provisions of stat. 1 Geo. 4, c. 101; and in the case of a prosecution for an offence committed abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by stat. 42 G. 3, c. 85. (4) The stat. 54 G. 3, c. 15, which was passed for the purpose of facilitating the recovery of debts in the Courts of law in New South Wales, prescribes the mode of obtaining the affidavits of witnesses, resident in this country, and makes them equivalent to *vidæ vocæ* proof in open Court, or to examinations under commissions.

Witnesses in India.

The amendments effected by these statutes are very partial; except in the cases thus specially provided for, the evidence of witnesses, who would be unable to attend by reason of absence in foreign countries, or by reason of dangerous illness, or per-

(1) *Furley v. Newnham*, 2 Doug. 419. *Mostyn v. Fabrigas*, Cowp. 174. *Calliard v. Vaughan*, 1 Bos. & Pull. 211. As to the admissibility of depositions on interrogatories, see *infra*.

(2) *Stephens v. Crichton*, 2 East,

259. *Taylor v. Roy*, Ex. Ass. Comp. 8 East, 393.

(3) As to the practice under this stat. see *Tidd's Prac.* 9th edit. App. 1833, p. 160.

(4) *Rex v. Jones*, 8 East, 31.

manent infirmity, could not be obtained. To prevent a failure of justice from any of these circumstances, the Courts of law resorted to the equitable jurisdiction, exercised in the manner above stated, to extort a consent from a reluctant party to the examination by interrogatories of witnesses, whose *vivâ voce* testimony it was impossible to obtain; but where such consent was withheld, the party seeking for a commission to examine witnesses could only obtain it by filing a bill in equity, instituting a new suit for the purpose auxiliary to the suit at law. (1) This subject attracted the notice of the commissioners appointed to inquire into the practice of the Court of Chancery, and subsequently of the commissioners of inquiry into the proceedings of the Courts of Common Law; and the reports of both these learned bodies expressed an opinion, that the Courts of Law should be invested with a power of examining witnesses by interrogatories, to be exercised by the authority and under the control of the Court, in which the evidence when obtained is to be produced.

To carry into effect the recommendation of the commissioners, the stat. 1 W. 4, c. 22, was passed. The objects of that statute are threefold: First, to provide for the examination on oath of witnesses abiding out of the jurisdiction of the Courts of Law at Westminster, but within the dominions of the British crown. Secondly, to provide for the examination of witnesses abiding within the jurisdiction of the Courts of Law at Westminster, but whose personal attendance, illness or some other cause may be expected to prevent; and thirdly, to provide for the examination of witnesses abiding in foreign countries not subject to the crown of Great Britain. The first section, reciting the stat. 13 Geo. 3, c. 63, and that "certain powers are therein given, and provisions made for the examination of witnesses in India in the cases therein mentioned," enacts, "That all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in India, shall be and the

Powers as
to the exami-
nation of wit-
nesses in India,

(1) Report of commissioners into the practice of Chancery, 109, 2nd Rep. Cm. Law, p. 23.

same are hereby extended to all colonies, islands, plantations and places under the dominion of His Majesty in foreign parts, and to the Judges of the several Courts therein, and to all actions depending in any of His Majesty's Courts of Law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the Court, to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for."

extended to the colonies, &c. and to all actions in the courts at Westminster.

By the second section it is enacted, "That when any writ or commission shall issue under the authority of the said recited act, or of the power herein-before given by this act, the Judge or Judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the Court, whereof they are Judges, does or may possess for that purpose in suits or causes depending in such Court."

Section 2. Judges, to whom the commission is directed, empowered to enforce the attendance of witnesses.

By the third section it is enacted, "That the costs of every writ or commission, to be issued under the authority of the said recited act, or of the power herein-before given by this act, in any action at law depending in either of the said Courts at Westminster, and of the proceedings thereon, shall be in the discretion of the Court issuing the same."

Section 3. Costs of writs to be in the discretion of the Court.

The fourth section provides for the examination of witnesses whether within or without the jurisdiction of the Courts of Law at Westminster. It enacts, "That it shall be lawful to and for each of the said Courts at Westminster, and also the Court of Common Pleas of the county palatine of Lancaster, and the Court of Pleas of the county palatine of Durham, and the several Judges thereof, in every action depending in such Court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before

Section 4. Courts at Westminster, &c. may order the examination of witnesses, or a commission for that purpose.

the master or prothonotary of the said Court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the Court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

Section 5.
Compelling
attendance of
witnesses, or
production of
documents.

Disobedience
to be deemed a
contempt of
Court.

Payment of
expenses.

Proviso as to
production of
documents.

The fifth section enacts, "That when any rule or order shall be made for the examination of witnesses within the jurisdiction of the Court, wherein the action shall be depending, by authority of this act, it shall be lawful for the Court, or any Judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person, to be named in such rule or order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of Court, and proceedings may be thereupon had by attachment (the Judge's order being made a rule of Court before or at the time of the application for an attachment), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any

writing or other document that he would not be compellable to produce at a trial of the cause."

By other sections (1) provision is made for the examination of witnesses in custody, whose evidence is required; that all examinations shall be taken on oath or affirmation, false evidence being also specially declared to be subject to the penalties of perjury; and that the persons appointed to take an examination may make a special report, "upon the conduct or absence of any witness or other person thereon or relating thereto."

Section 6, 7, 8.

By the ninth section, except in the cases before specially provided for, the costs of the proceedings shall be costs in the cause, unless otherwise directed "either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court."

Section 9.
Costs of the order for examination may be made costs in the cause.

The tenth section requires as a condition to the substitution of the evidence thus obtained for the *voir dire* testimony, that "it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions."

Section 10.
Restriction as to the reading of examinations or depositions without consent of the party.

The eleventh section enacts, "That no order shall be made in pursuance of this act by a single Judge of the Court of Pleas of the said county palatine of Durham, who shall not also be a Judge of one of the said Courts at Westminster."

Section 11.
Proviso as to Judges of Durham.

It is not compulsory in the Courts of Law to exert the powers given them by this statute, and in practice they exer-

cise a discretion in either refusing a rule or order altogether, or granting it on terms adapted to prevent the abuse of the statute to purposes of oppression or delay. In general the examination is made by interrogatories previously prepared, but it may be directed that the witnesses shall be examined and cross-examined *vidv voce*, or partly *vidv voce* and partly on interrogatories. (1) If taken *vidv voce*, the answers are reduced into writing, and returned to the Court from which the process issued.

Material witness absent.

Motion to put off trial.

By plaintiff.

If the defendant is unable to proceed to trial, on account of the absence of a material witness, he may move the Court in term-time, or apply to a Judge in vacation, on an affidavit of the facts, to put off the trial till the next term; or in the Common Pleas, if necessary, to a more distant period. (2) An application to put off a trial beyond the existing sittings, or from sittings to sittings, is not allowed on the part of the plaintiff; for he has the power at any time of withdrawing the record, if he is not prepared to try the cause. But where, from the sudden indisposition of a witness, who may be able to attend in the course of a day or two, or for any other temporary reason, the plaintiff is prevented from trying his cause in its order in the paper, yet has ground to believe that he shall be able to try before the sittings are over, it would be too much to make him, in such a case, withdraw his record; and a Judge at *nisi prius* will therefore make an order for the trial to stand over, till the witness is likely to attend. (3) It is a rule in the Court of Common Pleas, that the trial of a cause can never be put off on the consent of the parties and counsel, at the sittings at *nisi prius*, but the plaintiff must either proceed to try or withdraw his record. (4)

Before the Court will consent to put off the trial on account of the absence of a material witness, it requires to be satisfied

(1) *Pole v. Rogers*, 3 Bing. N.C. 780.

(2) Pr. Reg. 368. Tidd. Pr. 831. See form of affidavit in Tidd. App. 312.

(3) *Ansley v. Birch*, 3 Campb. N. P. C. 333, by Lord Ellenborough.

(4) 2 Taunt. 221.

that injustice would be done by refusing the application, and that the party, who makes the application, has not conducted himself unfairly, nor been the cause of any improper delay. (1) The rule will not be granted to the defendant, after he has pleaded a sham plea, by which a trial has been lost, unless he consent to pay the money into Court; (2) nor, where the testimony of the absent witness is intended to set up an odious defence, (as, that the plaintiff is slave to the defendant, and therefore cannot recover in the action, or that he is an alien enemy, &c.); (3) nor will it grant the rule for the purpose of giving the defendant an opportunity, which he has once lost by his own neglect, of applying to a Court of Equity for a commission. (4)

By defendant.

When a motion is about to be made to a Judge at *nisi prius*, for putting off the trial of a cause on account of the absence of a witness, notice should first be given to the plaintiff's attorney, with a copy of the intended affidavit. This affidavit ought regularly to be made by the defendant himself; but if he is abroad or out of the way, it may be made by his attorney or a third person. (5) The affidavit generally states, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavoured without effect to get him subpoenaed; but that he is in hopes of procuring his future attendance. (6)

(1) *Saunders v. Pitman*, 1 Bos. & Pull. 33.

(2) *Tidd. Pr.* 831.

(3) *Robinson v. Smyth*, 1 Bos. & Pull. 454.

(4) *Calliard v. Vaughan*, 1 Bos. & Pull. 212.

(5) *Peake*, N. P. C. 97.

(6) See form of affidavit, *Tidd. Pr. Appx.* 312.

SECTION II.

Of the Inspection of Public Writings.

Records.

The judicial records of the king's courts are safely kept for the public convenience, that any subject may have access to them for his necessary use and benefit;—which was the ancient law of England, and is so declared by an act of parliament in the forty-sixth year of Edward III. (1)

Copy of indictments.

Some restriction of the general right of inspecting records has been thought necessary in the case of an acquittal on a prosecution for felony; in which case, if the trial is at the Old Bailey, a copy of the indictment cannot regularly be obtained without an order from the Court; and it is a common practice, on the circuits, to apply to the Court for a copy at the time of the trial. This practice appears to have been first adopted at the Old Bailey, in pursuance of an order made by some of the Judges, for the regulation of those sessions, in the twenty-sixth year of Charles II. (2) It was then ordered, "that no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery: for the late frequency of actions against prosecutors which cannot be without copies of the indictment, deterreth people from prosecuting for the king upon just occasions." And Lord Holt has laid it down as a general rule of law, that if a person be indicted for felony and acquitted, and means to bring an action (without sufficient cause), the Judge

Order for.

In case of felony.

(1) 3 Inst. 71. Pref. to 3d Rep. p. 3, 4. See Sir R. Grahame's Trial, 12 Howell's St. Tr. 659.

(2) Directions for Justices at the Old Bailey, prefixed to Kelyng's Rep. p. 3, order 7. See Brangam's case, 1 Leach, Cr. C. 32. In this case, Willes, C. J., is reported to have said, that, by the laws of the

realm, every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record, for any use which he may think fit to make of it; and that, after a demand, the proper officer might be punished for refusing to make out a copy.

will not permit him to have a copy of the record, and he cannot have a copy without leave. (1) In the case of *Vandercomb* and *Abbott*, (2) the prisoners after their acquittal applied for copies of the several indictments, for the purpose of assisting them in their plea of *autrefois acquit*: the Court, however, refused to grant them copies, but ordered the officer to read over the indictments slowly and distinctly, which was accordingly done.

The rule of the Judges states, that an action against a prosecutor cannot be maintained without a copy of the indictment, and that a copy is not to be given without an order from the Court; but it is not to be inferred from this, that an order is essentially necessary for the introduction of a copy in evidence, or, if a copy were offered to be produced without an order, that it could on that account be properly rejected. The admissibility of such evidence has been determined in the case of *Legatt v. Tollersey*. (3)

The rule, which has been before mentioned, is confined to cases of felony. In prosecutions for misdemeanors, the defendant is entitled to a copy of the record, as a matter of right, without a previous application to the Court. (4) So, in the case of a conviction by a magistrate, the defendant is entitled to a copy of the conviction, in order to defend himself against an action for the same offence; and if it should be refused, and the defendant in consequence sue out a writ of *certiorari*, merely for the purpose of procuring a copy and making his defence, the magistrate will be compelled to pay his own costs of returning the conviction. (5) The conviction may be drawn up at any time, before the return to the *certiorari* or to the sessions, though after a commitment, (6) or after the levying of the penalty. (7) And the conviction returned to the sessions, or to

In case of
misdemeanor.

(1) In the case of *Dr. Groenvelt v. Dr. Burwell* and others, 1 Lord Raym. 253. But see *Browne v. Cumming*, 10 B. & C. 70, in which this seems to have been considered a doubtful point.

(2) 2 Leach, Cr. C. 821.

(3) 14 East, 302.

(4) *Morrison v. Kelly*, 1 Black. Rep. 385. *Evans v. Phillips*, reported from MS. in Selw. Ni. Pri. 952.

(5) *Rex v. Midlam*, 3 Burr. 1721.

(6) *Massey v. Johnson*, 12 East, 67, 82. 16 East, 20.

(7) *Rex v. Barker*, 1 East, 186.

the Court of King's Bench, is the only one, of which those courts take judicial notice. (1)

Inspection of
depositions.

Formerly a defendant on a criminal charge was not entitled to an inspection of the grounds, upon which the prosecution had been instituted. In some species of treason, indeed, the prisoner was entitled to a copy of the indictment, a privilege not allowed by the common law, but conferred by act of parliament; but neither in cases of treason nor of felony had he any right to a copy of the depositions of witnesses, who were to appear against him.

Prisoner's
counsel act.

But by the statute (2) to enable prisoners to make a full defence by counsel, or attorney, it is enacted, that all persons held to bail or committed to prison for any offence against the law, shall be entitled to copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three half-pence for each folio of ninety words: provided always that if such demand shall not be made before the day appointed for the commencement of the assize or sessions, at which the trial of the person, on whose behalf such demand shall be made, is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person presiding at such trial shall be of opinion, that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge, or other person presiding at such trial, if he should think fit to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged. And by another section (3) of the same act it is enacted, that all persons under trial are entitled at the time of their trial to inspect without fee or reward all depositions, (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.

(1) *Ibid.* 188.

(2) 6 & 7 W. 4, c. 114, s. 4.

(3) Sec. 4.

When informations are filed by the Attorney-General, on depositions taken under the excise laws, the defendant is not allowed to inspect those depositions. And in a case where an information was filed against an officer of the East India Company, on charges of delinquency founded upon the report of a board of inquiry in India, the Court of King's Bench were of opinion, that the defendant had no right to have an inspection of that report, and that the Court had no discretionary power to grant it. (1) "The practice on indictments at common law, and on informations upon particular statutes," said Mr. Justice Buller on that occasion, "shows it to be clear, that the defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial."

It was decided in the case of *Fox v. Jones*, (2) that where writs and other proceedings in a cause are officially in the custody of an officer of the Supreme Courts, he may be compelled by a rule of Court, to allow an inspection of them, though it be for the purpose of affording evidence in an action against that officer for negligence. In that case an action was brought against the Marshal of the King's Bench Prison for the escape of a prisoner in his custody on mesne process, and the Court of King's Bench made a rule absolute, calling upon the defendant to allow the plaintiff's attorney to inspect, and take a copy of the writ of *habeas corpus*, and of the return annexed. (3)

Proceedings
in courts.

The right of inspecting the proceedings of inferior jurisdictions is more limited. It cannot be necessary for the interests of the public, that they should be open for inspection

Proceedings of
inferior jurisdictions.

(1) *Rex v. Holland*, 4 T. R. 691.

(2) 7 B. & C. 732.

(3) *Semble, contra*, *Rex v. Sheriff of Chester*, 1 Ch. 476, and *Davies v. Brown*, 9 Moore, 778. But in the former case, the application to compel inspection seems to have been made to the wrong court; and in the latter, where the Court of Common Pleas, in a case similar to *Fox v. Jones*, refused to compel the Warden of the Fleet to allow the plaintiff, in an action against

him for an escape, to inspect the writ of *habeas corpus* and *commititur*, the decision seems to have been founded on the ground, that the documents required were not properly in the custody of the warden. *Davis v. Brown* was decided before *Fox v. Jones*, but a case, not reported, of *Wigley v. Jones*, was cited in argument, as a decision of the King's Bench, that the plaintiff was not entitled to an inspection.

to all persons without distinction; but on the other hand, it seems reasonable, that, in any suit, where the regularity of those proceedings may come into question, a party should have the power of taking a copy of such as have been instituted against himself. In an action of trespass and false imprisonment, brought by the plaintiff, who had been sued in the Court of Conscience in London, the Court of King's Bench allowed the plaintiff to inspect the proceedings, so far as they related to the suit against himself, on the ground that every one has a right to look into the proceedings to which he is a party. (1) In another case, where the plaintiff, having been fined for neglect of duty, as an under officer to the commissioners of lieutenancy for the city of London, brought an action of trespass against the defendant for distraining upon him, the Court granted the plaintiff a rule for inspecting and taking copies of the rates and assessments made by the commissioners. (2) On the same principle, in an action for a malicious prosecution and false imprisonment, the plaintiff may obtain a rule for a copy of the information, upon which he was committed; and as the original itself ought to be produced at the time of the trial, the Court will also grant a rule, calling upon the committing magistrate to cause it to be produced. (3)

Parish registers and other public books.

Parish registers, books of the India Company relating to the transfer of stock, books of the Bank, &c., are for some purposes considered as public books; and persons interested in them have a right to inspect and take copies of such parts as relate to their interest. (4) So the books of the commissioners of the lottery, and their numerical lists, are of a public

(1) *Wilson v. Rogers*, 2 Str. 1242.

(2) *Edwards v. Vesey*, Rep. temp. Hard. 128.

(3) *Rex v. Smith*, 1 Stra. 126. *Welsh v. Richards*, Barnes. 468. *S. P. Herbert v. Ashburner*, 1 Wils. 297. *Moody v. Thurston*, 1 Stra. 304, and *Rex v. Commissioners of Land-tax*, 2 T. R. 254. See *Groenvelt v. Burwell*, 1 Lord Raym. 253, 454. *Carth.* 421, 491, *S. C.* *Avery v. Dickenson*, Say. 250.

(4) *Geery v. Hopkins*, 2 Lord Raym. 851. *Warriner v. Giles*, 2 Stra. 954. *Mayor of London v. Swinland*, 1 Barnardist. 454. In an action against the Churchwardens contesting the validity of a rate, the plaintiff, a rate-payer, was allowed to inspect the parish books. *Newell v. Simpkin*, 6 Bing. 565. *Golding v. Fenn*, cited by *Patteson, J.*, in *Rex v. Staffordshire*, 1 N. & P. 264.

nature; and kept by the commissioners in trust for the ticket-holders, who are entitled to an inspection, by rule of court. (1)

Access will not be granted to the books of public offices in collateral actions brought by persons who have no interest in the books; therefore, in a *qui tam* action for penalties against a clerk in the post-office, for interfering in the election of a member of parliament, the prosecutor was not allowed to have a rule for inspecting the books of the post-office, as the cause did not relate to any transaction in the post-office, for which transactions alone those books are kept. (2) Nor will the Court grant a rule for inspecting the custom-house books, for the purpose of furnishing evidence in an action between two persons who have no interest in the subject-matter, concerning the amount of a particular branch of the public revenue. (3)

Book of public offices.

The court-rolls of a manor are kept in the custody of the lord or his steward, not for the use of the lord alone, but as the common evidence of the manorial rights, to which evidence all the tenants of the manor, whether copyhold or freehold, have an undoubted right of access, as well in actions between the tenants and the lord, as between the tenants themselves (4); and it is now a matter of course to grant a rule for the inspection of the court-rolls and ancient writings of a manor, on the application of a tenant, who has been refused by the lord. And by the rule, H. T. 2 W. 4, s. 102, "An order upon the lord of a manor, to allow the usual limited inspection of the court-rolls, upon the application of a copyhold tenant, may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for, and been refused inspection."

Rolls of manor courts.

There are many cases in which provision is made in particular

Statutes directing inspection.

(1) *Schinotti v. Bumstead* and others, cited from a MS. case, in 2 Tidd's Prac. 596.

(2) *Crew v. Blackburn*, cited 1 Wils. 240. 2 Stra. 1005, S. P.

(3) *Atherfold v. Beard*, 2 T. R. 614, 616. The *dictum* in this case proceeded on the ground, that it would be contrary to the public in-

terest to compel the disclosure of such official matters.

(4) *Roe v. Aylmer*, Barnes, 236. *Hobson v. Parker*, *ib.* 237. *Addington v. Clode*, 2 Black. Rep. 1030. *Folkard v. Hemet*, *ib.* 1061. *Rex v. Shelley*, 3 T. R. 141. *Rex v. Lucas*, 10 East, 235. *Bateman v. Phillips*, 4 Taunt. 162.

statutes, for the keeping of documents, and for the allowance of an inspection of them; such provisions are contained in the municipal corporation act; (1) in the general registry act (2) of births, marriages, and deaths; and in the statutes passed in the recent sess. 7 W. 4, and 1 Vict. c. 83. By the latter act clerks of the peace are required to take custody of documents which the houses of parliament require to be deposited with them, and they are directed by the same statute to allow all persons interested, to inspect and take copies of them, on payment of certain regulated fees. There are similar provisions contained in many local acts. (3)

Who may
inspect.

Documents may be of a general public nature, or of a local or limited public nature, and the right of inspection is correlative. This distinction is illustrated by the case of the *King v. The Bishop of Ely*, (4) in which, at the instance of a person who was an adverse claimant to the Bishop of Ely of the patronage of a benefice in the diocese, a mandamus was issued to the bishop, commanding him to allow the other party to inspect his registry of presentations and institutions to the living in question. Lord Tenterden said, "the books of a corporation are kept for the use of the body at large, or that of the individual members, and not for the use of strangers; so also are parish books, but a bishop's register of institutions is kept for the use of all persons claiming title to livings in his diocese. It therefore differs from the others, and is of a public nature." In an early case (5) the Court said, that the practice of compelling an inspection of court-rolls was the origin of all similar cases, and that the right to inspection was confined to persons interested; "the rolls being the common evidence which must necessarily be kept in some one hand." An inspection was for that reason refused in an action of ejectment by an impropiator against the churchwardens of a parish, where a rule was applied for on the part of the plaintiff, sug-

(1) 5 & 6 W. 4, c. 76.

(2) 6 & 7 W. 4, c. 86, s. 36.

(3) See *Rex v. St. Marylebone*, 5 Ad. & El. 268.

(4) 8 B. & C. 112. See the same

rule laid down by Bayley, J., in *Rex v. Buckingham*, *ib.* 579.

(5) *Crew q. t. v. Saunders*, 2 Str. 1005.

gesting that the parish books would make the title appear, and that they were the common books belonging to the parish at large; but the Court were of opinion, "that the impropiator has a distinct interest from the parishioners, for it was not a parochial right, but a title which came in question." (1) For the same reason, a public company will not be compelled to produce any books relating to their private transactions. (2) In a case (3) where an indictment had been preferred by the inhabitants of a parish against the county for the non-repair of a bridge in the parish, and the question was, whether the parish or the county were liable to the expense of repairing the bridge, a rule for allowing to the parties indicted an inspection of the accounts of the parish, relating to the previous repairs of the bridge, was refused. Bayley, J., in giving judgment, laid down the rule in strict accordance with the above doctrine. "In order," said the learned Judge, "to entitle a party to inspect books, they must either be public books, or the party who applies for such inspection must have an interest in them. In the case of corporation books, no person wholly unconnected with the corporation has a right to inspect them. This is a public prosecution, and the application is made on behalf of the defendants. If all the subjects of the realm have an interest in the books and documents it ought to be granted. But these books are kept not for the benefit of all the subjects of the realm, or even of the inhabitants of the county, but for the benefit and on the behalf of the inhabitants of the parish." (4)

Who may
inspect.

And it seems that a person cannot be considered to have a sufficient interest to entitle him to inspect the documents of a public body, if by law he is excluded from all control over the matters to which they relate; for example, a rate-payer in a county has not a right to inspect and take

(1) *Cox v. Copping*, 5 Mod. 396.
1 Lord Raym. 337. *Lewis v. Baker*, 1 Barnard. 100. *Turner v. Gethin*, Vin. Abr. Evidence, (F. b.) pl. 11. *Stevens v. Berwick-on-Tweed*, 4 Dod. 277.

(2) *Shelling v. Farmer*, 1 Str.

646. *Murray v. Thornhill*, 2 Str. 717.

(3) *Rex v. Buckingham*, 8 B. & C. 375.

(4) And see *Rex v. Antrobus*, 2 Ad. & E. 788; and *Rex v. Great Westowe*, 1 Nev. & Per. 226.

Who may
inspect.

a copy of the charges of county officers, whose bills have been allowed by the justices at Quarter Sessions, in whom alone is vested the jurisdiction of allowing or disallowing them. (1)

Court-rolls.

The privilege of inspection of court-rolls is confined to the tenants of the manor, and does not extend to third persons, who have no concern or connection with the manor-court or the court-rolls. Thus, in an action of trespass, where the question was, whether the place, in which the trespass was alleged to have been committed, was within the manor of the plaintiff, or part of a manor claimed by the defendant, the Court held, that the defendant, who, as it appeared from his affidavit, was not a tenant of the plaintiff's manor, nor claimed any interest under him, could not be entitled to an inspection. (2) And it may be laid down as a general rule, that where the question is on the custom of a manor between the lord and a stranger, the lord will not be obliged to let him have an inspection of the rolls, because, in a dispute with a stranger, they may be considered as his private evidence: but if the dispute is between tenants of the manor, or between the lord and a tenant, the lord shall produce the roll, and permit copies to be taken.

Corporation
books.

Corporation-books are open to the members of the corporation, as court-rolls are to the tenants of a manor.* Thus, where a mandamus had been granted, to admit a person into a

(1) *Rex v. Nottingham*, 3 Ad. & E. 500. *Rex v. Marylebone*, 5 Ad. & E. 269. *Rex v. Staffordshire*, 1 Nev. & Per. 260, overruling *Rex v. Leicester*, 4 B. & C. 891. See also *Rex v. Great Farringdon*, 9 B. & C., as to inspection of accounts kept by guardians of the poor of

parish expenditure.

(2) *Talbot v. Villeboys*, cited from MS. by Buller, J., 3 T. R. 142. *Smith v. Davies*, 1 Wils. 104. *Bishop of Hereford v. Duke of Bridgewater*, Bunb. 269. *Attorney General v. City of Coventry*, Bunb. 290.

* See the provisions of the municipal corporation act, 5 & 6 W. 4, c. 76, as to the documents of which officers of the corporation are obliged to allow inspection to the members. And see *Davis v. Humphreys*, 3 M. & S. 223, as to what documents are comprehended in a similar provision of the earlier act, 32 G. 3, c. 58, s. 4.

corporation, and by the returns it appeared to be a question, whether the master, under whom he had served, had been admitted to his freedom in the corporation, a rule was moved for, on the part of the person claiming admission, to inspect the books of the corporation; and the Court held, that every member has a right to inspect and take copies of corporation-books for any matter that concerns himself, even in a dispute with strangers; but, as the return had pointed out the necessity of inspecting them for a particular purpose, the rule should be confined to such books as contained the admissions of freemen. (1)

Who may
inspect.

Where an information in the nature of a *quo warranto* had been obtained, at the relation of corporators, against a person charged with unlawfully holding a corporation-office, the Court held, that these relators were entitled to inspect the books, and that the rule should be limited to the inspection of such papers, as related to the subject-matter in discussion. (2) And in an action for the breach of a bye-law, restraining all but freemen from exercising trades within a corporate city, the Court compelled the corporation to allow the defendant to inspect the bye-law in their books, (3) on the ground, that though he was not a member of the corporation, yet being one of a class of persons affected by the bye-law, he was not to be regarded as a stranger, and was entitled to demand inspection.

This right of inspecting the muniments of a corporation is confined to the members of the corporate body. A stranger has no better right to inspect corporation books, than to inspect the books of any private person. On a prosecution against a person for practising physic, (not being a member of the college of physicians, nor having a licence, nor being a graduate of either university,) the defendant moved for leave to inspect the book of the college of physicians; but the Court refused

(1) *Rex v. Fraternity of Hosman*, in Newcastle, 2 Stra. 1222.

(2) *Rex v. Babb*, 3 T. R. 579.
Crew q. t. v. Saunders, 2 Str. 1005.
Corporation of Barnstaple v. La-

they, 3 T. R. 303. *Young v. Lynch*, 1 Black. Rep. 27.

(3) *Harrison v. Williams*, 3 Barn. & Cress. 162.

Who may
inspect.

to grant the rule, as the defendant, who was not a member, had no right to see the books. (1) And in an action of trespass, where the defendant justified under a corporation for distraining for a toll, the Court refused a similar rule to the plaintiff, who was a stranger to the corporation. (2)

A different practice was at the time introduced in Courts of Law, (3) upon the ground, that, on filing a bill for disclosure in a Court of Equity, an inspection would be granted as a matter of course; and that it would only cause unnecessary expense to send the parties into that Court. But this practice, which was not warranted by earlier authorities, (4) nor conformable to the practice of Courts of Equity, (5) has been long discontinued; and the rule of law, now established, is, that in disputes between several members of a corporation an inspection of the corporation-books will be granted, because each has a right to see them: but an inspection will not be granted in the case of a corporation, when a similar inspection would be refused, if the suit were between private persons. No distinction is to be made, in this respect, between a corporation aggregate and a corporation sole, nor between a corporation sole and a private person suing in his individual capacity. (6)

Inspection
when not
compelled.

The rule for inspecting court-rolls, corporation-books, and other public writings, will not be allowed, where the party, who has them in his custody, would, by producing them for inspection, disclose any evidence of a criminal nature, or expose himself to a prosecution. On an information, therefore, against several persons, for executing an office of trust without taking the oaths, the Court refused a motion for leave to inspect some books kept by the defendants, in which they had entered their

(1) Dr. West's case, cited 1 Wils. 240. *Allan v. Tapp*, 2 Black. Rep. 850.

(2) Cited by De Grey, C. J., in *Hodges v. Atkis*, 3 Wils. 398, and by Lawrence, J., in 8 T. R. 594. *Mayor of Southampton v. Graves*, 8 T. R. 590.

(3) *Mayor of Lynn v. Denton*, 1 T. R. 669. *Corporation of Barn-*

staple v. Lathey, 3 T. R. 303.

(4) Dr. West's case, cited 1 Wils. 240. *Rex v. Dr. Bridgeman*, 2 Str. 1203. *Mayor of Exeter v. Coleman, Barnes*, 238. *Hodges v. Atkis*, 3 Wils. 398.

(5) See as to the practice in Equity, *Kynaston v. The East India Co.*, 3 Swanst. 248.

(6) 8 T. R. 593.

elections, receipts, and disbursements, as it would have compelled them to give evidence against themselves in a criminal prosecution; (1) and a similar motion was refused, on an information against two overseers for making a rate without the concurrence of the churchwardens. (2) Another case to the same effect is the case of the *King v. Dr. Purnel*, (3) where, on an information against the defendant for a misdemeanor in his office of vice-chancellor of the university of Oxford, a rule for taking a copy of the University-statutes, in the care of the keeper of the archives, was refused by the Court of King's Bench after great consideration; and the principle, that no man shall be bound to criminate himself, was fully recognized.

Inspection
when not com-
pelled.

In the recent case of the *King v. Antrobus*, (4) in which an information was filed against the sheriff of the county of Chester for not executing a criminal, and the question was, whether it was the duty of the sheriff of the county, or of the officers of the corporation of the city of Chester to execute the criminal, the Court refused to issue a mandamus to the corporation, to allow an inspection of their muniments on the defendant's behalf. The grounds of the decision do not appear in the report, but it seems to be a sufficient reason for the refusal, that the sheriff was not a member of the corporation, and, though the person, who made the application to inspect in his behalf, was a free-man, yet, as he did not make it in his own right, that circumstance would not make any difference.

This principle will not apply to the case of informations in the nature of a *quo warranto*, for usurping a franchise, or intruding into a corporation-office: for such informations, although originally and strictly criminal methods of prosecution, are applied to the purpose of trying civil rights, and are considered at present as merely civil proceedings. On an information, therefore, exhibited at the relation of a member of a cor-

Quo warranto.

(1) *Rex v. Mead*, 2 Lord Raym. 927. *Rex v. Worsingham*, 1 Lord Raym. 705. *Rex v. Cornelius*, 2 Str. 1210.

(2) *Rex v. Lee*, cited 1 Wils. 240.

(3) 1 Wils. 239. 1 Black. Rep. 37. *Rex v. Haydon*, 1 Black. Rep. 351. See also *Rex v. Earl of Cadogan*, 5 Barn. & Ald. 902.

(4) 2 Ad. & El. 788.

poration, against a person for unlawfully executing an office, the relator, who as member has a right and interest in the books of the corporation, may obtain an inspection and copy of such, (and of such only,) as relate to the subject-matter in discussion. (1)

Parish book.

Private use.

Public.

How to obtain inspection.

When.

In a case before the Court of King's Bench, (2) an action having been brought for a libel contained in a written statement, which the defendant had drawn up respecting the plaintiff's conduct, the defendant applied for a rule to inspect certain documents belonging to the parish, then in the plaintiff's possession, from which documents he had drawn up his statement by the authority of the vestry. The inspection was required, with the view of enabling the defendant to justify in the action. But the Court refused to order the plaintiff to furnish evidence against himself: if the papers, the Court added, had been wanted for the purpose of advancing any parochial right, the case would have been different.

The motion for a rule to inspect and take a copy, where an action is depending, is founded on an affidavit stating the circumstances under which the inspection is claimed, and stating further, that an application has been made in the proper quarter, for permission to make the required inspection, which has been refused. (3) Where a motion for a mandamus, or for an information in the nature of a *quo warranto* in a corporation, is depending, the Court will grant a rule absolute in the first instance. (4) But when the motion is for a writ of mandamus to inspect, grounded upon affidavits, the rule, to be granted, is only a rule to show cause.

With regard to the proper stage of the proceedings for

(1) *Rex v. Babb*, 3 T. R. 579.

(2) *May v. Gwynne*, 4 Barn. & Ald. 301.

(3) *Roe v. Aylmar*, Barnes, 236. And see *Rex v. Wilts and Berks Canal Company*, 3 Ad. & E. 477, as to what is a sufficient refusal, and the consequences of neglecting to make a sufficient previous

demand. It seems the necessity for having an inspection must be shewn to the Court; *Gas Company v. Clarke*, 7 Bing. 95. *Rex v. Clear*, 4 B. & C. 898. *Rex v. Merchant Tailors' Company*, 2 B. & Adol. 115.

(4) *Rex v. Shelley*, 3 T. R. 141.

making the application, it may be observed, that the Court has refused the motion in an action against a corporation upon a right of toll, *because issue was not joined*, so that it could not appear, whether an inspection would be necessary. (1) And in the case of *Dr. Groenvelt v. Dr. Burwell*, where the plaintiff applied for a copy of the proceedings, instituted against him by the college of physicians, the Court admitted the rule for inspecting the proceedings to be usual, for the sake of evidence, *after issue joined*, but not by way of assisting the party to plead. (2) If a rule has been granted to show cause, why a mandamus should not be awarded, the Court will not make a rule for inspecting and taking copies, until the first rule is made absolute, and a return is made to the mandamus; (3) and it has been thought the most convenient practice, where a rule *nisi* for a *quo warranto* information has been obtained, not to grant an inspection, until the information is granted. (4)

If no action is depending, the proper motion is for a rule to show cause, why a writ of mandamus should not issue, commanding the officer, who has the custody of the books, to permit the party to inspect and take a copy. The affidavit, upon which this motion is founded, ought to state clearly the right, under which the inspection is claimed, and that the inspection has been refused, and the reason for requiring the inspection. (5) In a case of this kind, where an inspection of the court-rolls of a manor was applied for, the party stated in his affidavit a *prima facie* title to a copyhold of the manor; and the Court of King's Bench held, that, as he was clearly entitled to the copyhold, unless it had been conveyed away by those under whom he claimed, he had a right to see, whether any such conveyance appeared on the rolls; and the Court, there-

Where no
action depend-
ing.

(1) *Hodges v. Atkis*, 3 Wils. 398. 2 Black. Rep. 877. S. C.

(2) *Carthew*. 421. This distinction has not been supported by modern cases. In *Fox v. Jones*, *supra*, 805, the Court compelled the marshal of the King's Bench prison to allow an inspection of a writ for the express purpose of enabling

the plaintiff to declare; and that is the constant practice with respect to private documents.

(3) *Per Cur.* in *Rex v. Justices of Surrey*, Say. 144.

(4) By Ashurst, J., in *Rex v. Babb*, 3 T. R. 581. *Rex v. Hollister*, Rep. temp. Hard. 245.

(5) *Supra*, 814, note (3).

fore, made the rule absolute, so far as related to the copyhold lands, the subject of the party's claim. (1)

SECTION III.

Of the Inspection of Private Documents.

A very useful jurisdiction is exercised by the superior Courts of Law at Westminster in assisting the parties to a suit, by compelling the production of writings which relate to the matter in dispute. In the earlier reported cases, the principles which regulate this jurisdiction are not very clearly defined. Lord Mansfield, who, upon this and every other branch of the law, endeavoured to make the jurisdiction of the Court, over which he presided, complete in itself and independent of the assistance of Courts of Equity, seemed disposed to compel the production of all papers "which a party could get at in a bill in equity for a discovery." (2) There appears, however, to be no case, in which so extensive a rule has been acted upon, but there are many authorities which restrict the right of a party to a suit to an inspection of those documents only in which he has a species of property, and which therefore the party in possession may be considered to hold as trustee for the other. (3)

Oyer of deeds. The practice of compelling one party to a suit to produce instruments, by which he seeks to charge the other, has probably grown up from analogy to the practice which required a profert to be made of all instruments in his pos-

(1) *Rex v. Lucas*, 10 East, 235; and see 3 T. R. 142. *Rex v. Tower*, 4 M. & S. 162.

(2) *Barry v. Alexander*, 1 Tidd. Pr. 9th edit., 592. 4 Dougl. 15.

(3) By Tindal, C. J., *Jessel v. Millingen*, 1 M. & Scott, 606. R.

acc. *Pickering v. Noyes*, 1 B. & C. 262. *Ratcliffe v. Bleasby*, 3 Bing. 150. *Lord Portmore v. Goring*, 4 Bing. 152. *Rowe v. Howden*, *id.* 539. *Rundle v. Beaumont*, *id.* 537. *Cocks v. Nash*, 9 Bing. 723.

session under seal stated in the pleadings; one of the reasons for which was, that it might appear whether the effect of the deed was truly given, or whether the deed was upon "condition, limitation, or power of revocation, &c. to the intent that if there be a condition, limitation, or power of revocation in the deed,—if the deed be poll, or if there wants a counterpart of the indenture,—the other party may take advantage of the condition, limitation, or power of revocation." (1) The doctrine, respecting the production of deeds on oyer, relates to the law of pleading rather than to the law of evidence. The benefit of the obligation to produce instruments under seal, of which profert is made, is obtained in other cases by the exercise of the equitable jurisdiction of the Court in compelling a party to produce documents, upon which a declaration or other pleading appears to be founded. A distinction was formerly taken between an express statement of a writing in the pleadings, and a statement of a contract of which the writing is merely evidence; it being held, that in the former case only, "the Court, on affidavit of the defendant that he had no part, would let him have a copy." (2) But this distinction has not been observed in modern practice, and in general the Court, without reference to it, will compel a party to allow an inspection of written documents, on which an action or defence is founded, if the party applying for inspection have the requisite interest in them. (3) It is, however, discretionary with the Court to make such an order, and a proper ground must be shewn for requiring it. (4)

Production of instruments declared upon or pleaded.

In the case of *Beale v. Bird*, (5) in an action on an agreement, the Court of King's Bench refused to compel a plaintiff to produce an order, for the purpose of enabling the defendant to plead in abatement the non-joinder of co-contractors. In one case (6) the Court of Common Pleas discharged a rule which

(1) *Leyfield's case*, 10 Coke, 92, *b*.

(2) *Suster v. Cowell*, 2 Keb. 430.
Hill v. Aland, 1 Salk. 215.

(3) *Barry v. Alexander*, 4 Dougl. 15, and see judgment of Dallas, C. J., in *Threlfall v. Webster*, 1

Bing. 161.

(4) *Infra*, 824.

(5) 2 D. & R. 419, and see *Threlfall v. Webster*, 1 Bing. 161.

(6) *Hildyard v. Smith*, 1 Bing. 451.

had been obtained to impound, in the hands of the prothonotary, a bill of exchange, on which the action was brought, in order that the defendant might see whether it was a forgery. In the case of *Chetwind v. Marnell*, (1) where an action was brought on a bond of the defendant's testator, the defendant, after obtainingoyer, pleaded *non est factum*, and then moved for a rule calling on the plaintiff to allow an inspection of the bond by an officer of the stamp duties, suggesting that it was a forgery; but the Court refused a rule, and Eyre, C. J., said, "The case was before me at chambers, but I thought it would be a violent measure to order the plaintiff to produce an instrument, which might be the means of convicting him of a capital felony. The defendant has already pleaded *non est factum*, and therefore the plaintiff will be obliged to produce the bond, if he means to succeed in his action. But as he may think better of it, we ought not to put his life in danger by the exercise of summary jurisdiction." And where (2) the defendant's attorney had stated in conversation, that he had a document signed by the plaintiff, which was a complete answer to the action, the same Court refused a rule calling upon the defendant to allow an inspection of it, though the plaintiff made an affidavit, that if such a document existed, it must be a forgery. In a recent case however, on a suggestion that the defendant's signature was a forgery, the Court of King's Bench in Ireland made a rule absolute to compel the plaintiff to deposit the bill, on which the action was brought, with the officer of the Court for the defendant's inspection. (3) It is apprehended, that the modern prevailing practice is in accordance with the latter decision, and that on a suggestion that the instrument sued upon is a forgery, or that it is of very old date, or on other sufficient ground, the Court would compel the plaintiff to allow an inspection. In the case of *Blakey v. Porter*, (4) an action was brought upon a covenant in an indenture of assignment, which was in the hands of the defendant, and of which there was no counterpart, and the Court of Common

(1) 1 B. & P. 271.

(2) *Jessel v. Millingen*, 1 M. & Scott, 605.(3) *Richey v. Ellis, Alcock & Napier*, 111.

(4) 1 Taunt. 386.

Pleas made a rule absolute, to compel the defendant to allow the plaintiff to read it and take a copy at his own expense. Sir James Mansfield said, the necessary consequence of the parties being content to execute one part only of an indenture, was "that the party who has the custody undertakes to produce the deed, when wanted for the use of both;" and Heath, J., assimilated the case to that of the inspection of court-rolls by a copyholder. It was held that it made no difference in the application of this rule, that the object of the party applying for inspection was to discover some defect in the deed. (1) In the case of *Blogg v. Kent*, (2) in an action on an agreement, the defendant pleaded, that there was no agreement in writing as required by the Statute of Frauds; the plaintiff replied, that there was such a writing: it was held, that the defendant was entitled to an inspection. Tindal, C. J. said, "the replication virtually inserts in the declaration an averment of an agreement in writing. It appears that one party only has a copy; and it comes round to the ordinary case, that where there is only one copy of the contract in dispute between the parties, the party who holds it is a trustee for the production of it to the other party."

In cases where the instrument is not the direct foundation of the action or defence, but is merely matter of evidence to be used at the trial, the rule compelling inspection seems to be the same. Where there is but one instrument between the parties, the Court will compel the party, in whose possession it is, to produce it for the inspection of the other. (3)

It has been already stated, that the foundation of the right to inspect an instrument is, that the party, in whose custody it is, is the trustee, so far as the production of it is concerned, for the

Must be only one instrument between the parties.

(1) *King v. King*, 4 Taunt. 666.

(2) 6 Bing. 614.

(3) *Goater v. Nunnely*, 2 Str. 1130. *Gracewood v. —*, Barnes, 439. *Bateman v. Phillips*, 4 Taunt. 157. *Morrow v. Saunders*, 1 B. & B. 318. *Gigner v. Bayly*, 5 Moore, 71. *Ratcliffe v. Bleasby*, 3 Bing.

148. *Devenage v. Bouverie*, 8 Bing. 1. *Reid v. Coleman*, 2 Cr. & M. 456. *Rex v. Winkles*, M'Clel. 33. *Whitbourne v. Pettifer*, 4 M. & S. 182. *Jones v. Palmer*, 4 Dowl. P. C. 447. *Doe d. Morris v. Roe*, 1 M. & W. 207.

other party. It seems that he must *ab initio* have received the custody under that implied trust; as, where it appears, that only one instrument was executed. There is no case in which a rule has been made to compel a party, who holds a counterpart of an instrument, to allow an inspection, on the ground that the other part has been lost or is inaccessible. In an action of (1) covenant on a charter party, it appeared that two parts of the deed had been executed, but it appeared that the plaintiff's part had been lost at sea in a vessel which foundered, and on this ground a rule was obtained to compel the defendant to allow the plaintiff to inspect and take a copy of his part; but the rule was discharged, and Sir Vicary Gibbs said, the case did not come within the rule, the defendant not being a trustee as to his possession of the deed.

To whom inspection may be given.

It seems that the person, in whose favour an order for inspection of documents is made, must be a party to the suit, but it is not necessary that he should be one of the parties executing the instrument; it is sufficient, if he be identified in interest with a party executing, as, for example, if he take an estate by way of remainder. (2) But unless he is either a party to the deed, or a party in interest, he cannot compel the other party to produce an instrument in his possession. (3) In one case (4) it was held, in an action against a sworn broker of the city of London for negligence in making a purchase for the plaintiff, that the plaintiff was entitled to an inspection of the entry in the defendant's books of the contract made on his behalf, on the ground that the defendant was the agent of the parties in making the contract and the entries. It was urged in argument in support of the rule, that it was the duty of the broker to make entries in his books of all contracts, and allow the

(1) *Street v. Brown*, 5 Taunt. 302. *Portman v. Goring*, 4 Bing. 152. *Sed vide* *Travis v. Collins*, 2 C. & J. 625.

(2) By *Heath, J.*, *Bateman v. Phillips*, 4 Taunt. 161. In *Brown v. Rose*, 6 Taunt. 283, the decision of the Court was not on this point,

but founded on their discretionary power to grant or refuse an application of this nature.

(3) *Lawrence v. Hooker*, 5 Bing. 6. See *Brown v. Rose*, 6 Taunt. 283, and the cases cited *supra*, 816, n.

(4) *Browning v. Aylwin*, 7 B. & C. 204.

parties to inspect them, and that he gave a bond to do so on his appointment.

In general the Court will not interfere to compel a person not a party to the suit to produce documents for inspection ; (1) but there is an exception to this rule, if the third party have obtained possession from a party to the suit. In that case, if it appear that there was but one instrument between the parties, he must be considered as holding it under notice, that it was previously held in trust for the production of it to the other party. Thus in a recent case, in an action of ejectment by a landlord against his tenant, where it appeared that the lessee of the premises in question had mortgaged his interest in the premises, and deposited the indenture of demise with the mortgagee, the Court of Exchequer made a rule absolute to compel the mortgagee to allow the lessor of the plaintiff to take a copy of the lease. (2) But where a third person is in possession of an instrument by a title paramount to that of the parties to the suit, it seems that the Court would not compel him to produce it. (3)

Instrument in the hands of a third party.

It appears, in general, whenever a party would be compelled to allow an inspection of a document, he may be called upon to produce it, for the purpose of being stamped, so that it may become admissible in evidence at the trial ; and in some cases, where the party holding an instrument would not be bound to allow an inspection, he may be compelled to allow the other party to stamp it. (4) Thus in the case of *Neale v. Swind*, (5) though there had been originally two parts of a document, (the destruction of one of which would not be a sufficient ground for calling upon the party possessed of the other part to allow an inspection,) (6) the Court held that, to prevent the failure of justice which would occur by the exclusion of all evidence upon the production of the unstamped instru-

Production for the purpose of stamping.

(1) *Rex v. Worsenham*, 1 Lord Raym. 705. *Cocks v. Nash*, 9 Bing. 721.

(2) *Doe d. Morris v. Roe*, 1 M. & W. 207, and see *Harris v. Aldrit*, 2 Ch. 229.

(3) See *Pickering v. Noyes*, 1 B.

& C. 262, and *Doe d. Morris v. Roe*, 1 M. & W. 207.

(4) See *Bateman v. Phillips*, 4 Taunt. 161.

(5) 2 Cr. & J. 278.

(6) *Supra*, 820, n. (1).

ment, the party holding the counterpart might be compelled to produce it at the stamp office; a production for that purpose was distinguished from a production for inspection by Bayley, B., and Vaughan, B.

Inspection directed by statute.
Actions on policies of insurance.

There are some cases, in which facility is given, by the express enactment of a statute, to the inspection of private documents. The stat. 19 G. 2, c. 27, s. 6, enacts, "That in all actions or suits brought or commenced by the assured upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they shall be required to do so, in writing by the defendant or his attorney or agent, declare in writing what sum or sums he had assured or caused to be assured in the whole, or what sums he has borrowed at *respondentia* or *bottomree* for the voyage or any part of the voyage." And it has been laid down that "in actions of this nature, a Judge at chambers will make an order for the assured to produce to the underwriters, upon *affidavit*, all papers in possession of the former relative to the matter." (1)

Annuity deeds.

The stat. 53 G. 3, c. 141, s. 5, enacts, "That in case any person or persons, by whom any annuity or rent-charge, of which such particulars as aforesaid are required to be enrolled, shall for the time being be payable, shall be desirous of obtaining a copy of every or any deed, bond, instrument, or other assurance, whereby such annuity or rent-charge was granted, and of such his, her, or their desire shall give twenty-one days' notice in writing to the person or persons for the time being entitled to such annuity or rent-charge, such person or persons shall on or before the expiration of such twenty-one days, unless prevented by fire or other inevitable accident,—and in that case, if the assurances shall not be destroyed by such accident, then as soon after as such impediment shall be removed,—send, or deliver to the person or persons requiring the same a copy of every deed, bond, instrument, or other assurance, whereby such annuity or rent-charge was granted, or of such of the as-

(1) Tidd's Prac. 9th edit. 591. which fully supports it, is Goldschmidt v. Marryat, 1 Campb. 562.
The authority cited for this position

surances as in such notice shall be required, and such last-mentioned person or persons shall at the time of receiving the same, pay to the person or persons furnishing the same a sum after the rate of sixpence for every one hundred words contained in every such copy, and also the reasonable costs of sending or delivering the same, and the person or persons holding the original instrument, by which such annuity or rent-charge shall be secured, shall suffer the person or persons, to whom such copies shall be delivered or sent, to examine the same with the originals, and in case such copies shall not be sent or delivered, or the person or persons holding the original instruments shall refuse to suffer such copies to be examined therewith according to the direction of this act, it shall be lawful for the person or persons by whom the annuity or rent-charge is payable, to take out a summons from any of His Majesty's justices of his Courts of King's Bench and Common Pleas, requiring the person or persons neglecting to send or deliver such copies, or refusing to suffer the same to be examined with the original instrument as aforesaid, to appear before such Judge and shew cause in the premises, and it shall and may be lawful for the Judge before whom such person or persons shall be summoned to make such order for the production of the instrument by which such annuity or rent-charge shall be secured, and for suffering the complainant to take copies thereof and examine the same or the copies delivered with the original instruments and otherwise in the premises as to such Judge shall seem meet."

In some instances the Court, in the exercise of it's equitable jurisdiction, will compel a party to allow an inspection of documents given in evidence by him on a former trial. (1)

Equitable jurisdiction in other cases.

In cases in which a Court of Law has not jurisdiction to compel a party to the suit to produce a writing, it has been held, that if the inspection desired be of such a nature as would be

Assisting a bill of discovery.

(1) See *Hewitt v. Pigott*, 7 Bing. 400. Note, that in this case the order for inspection was made upon the party to whom a new

trial had been granted, and the Court could have enforced it's order under penalty of discharging the rule for a new trial.

obtained by a bill of discovery, the Court will stay the proceedings on a refusal to give inspection, until the party applying for it shall have had an opportunity of resorting to a Court of Equity. (1)

But in a later case, (2) the rule was said to be, that a Court of Law would neither accelerate nor retard the progress of a cause, to defeat or assist any proceedings in equity. In general, however, this object may be obtained by injunction.

Discretion of
Court in im-
posing terms on
production.

Though the case in which inspection is sought, be clearly one in which the party in possession of the instrument holds it in trust to produce it for the other party, it seems to be discretionary with the Court to compel him to produce it. (3) And in one case, it was said, (4) that a Judge, in making an order for the production of an instrument, will, in general, make it a part of the order, and a condition of granting it, that the applicant shall undertake not to make an objection to the sufficiency of the stamp.

General juris-
diction of
Court.

It seems, that the common law jurisdiction of the Courts of Law for enforcing the production of private documents, is given by the pendency of a suit, and by that alone; there appears to be no instance in which a Court of Law has made a rule for the production of such documents, except where a suit has been pending, and where they have been required for the purpose of assisting in the inquiry involved in the suit. (5)

(1) *Whitter v. Casalet*, 2 T. R. 683.

(2) *Goldschmidt v. Marryat*, 1 Campb. 561.

(3) *Brown v. Rose*, 6 Taunt. 283. *Beale v. Bird*, 2 D. & R. 419, *supra*, 817. It is laid down in the marginal note to *Reid v. Coleman*, 2 Cr. & M. 456, that in cases within the rule, there being only one instrument, the party in possession of it "has no right to impose terms as a condition" for allowing it to be inspected. That case, however, deci-

ded only that he had no right to the terms, which he sought to impose, and not that the Court could not impose terms as a condition of the exercise of their jurisdiction.

(4) By Park, J., in *Price v. Boulby*, 1 C. & P. 466, and see *Bousfield v. Gregory*, 5 Bing. 420. *Dawson v. Macdonald*, 2 M. & W. *Sed vide* *Travis v. Collins*, 2 C. & J. 627.

(5) See *ex parte Partridge*, 1 Har. & W. 350.

Where a *prima facie* case is shewn for requiring the inspection of an instrument, or for the production of it, in order to be stamped, it seems that the other party, who cannot deny the fact of his having possession, will not be excused from producing it, on the ground that it is no longer in his power to do so, without making a very precise affidavit, stating not merely that it is not now in his possession, but also how it ceased to be so, and what has become of it; (1) and it has been said, that if an attachment issue for a contempt in not producing the document, the party in contempt would be obliged to answer on interrogatories. (2)

Excuse for non-production.

When a party claims a right to have an inspection or copy of a writing, he should make a demand for the purpose, and, if he require a copy, he should also offer to pay the costs of making it. On a refusal, a summons should be taken out, to shew cause before a Judge, why the application is refused. The Judge's order, granting or refusing an order, may be reviewed by the Court, but it is unusual to make the application in the first instance to the Court.

How production enforced.

It appears, though formerly doubted, that an order to produce a document may be enforced by the Court by attachment, (3) if the party refuse to produce it, or destroy it, or make away with it, in fraud of the other party's right to the production. In one case, (4) an order had been made for the production of a document, or in default thereof for a copy of the document, which it was admitted the defendant possessed, and a rule was obtained to set aside the order, on the defendants' affidavit, stating that the original agreement had never been stamped, and that it had been lost or burnt when he changed his residence; on the other side, it appeared by affidavit, that

(1) See *Cooke v. Tanswell*, 1 Moore, 465. 8 Taunt. 131, S. C. The two reports differ, but they both agree in this, that the possessor must shew that he has made every effort to comply with the order for the production of the document.

(2) 1 Moore, 465. This point does not appear in the other report of this case.

(3) *Cooke v. Tanswell*, 1 Moore, 465. *Travis v. Collins*, 2 C. & J. 628.

(4) *Bousfield v. Gregory*, 5 Bing. 420.

the plaintiff intended to have had it stamped within the time allowed by law, and that it had been deposited in the hands of a mutual friend of the plaintiff and the defendant, from whom the defendant had surreptitiously obtained it, and that it had been recently seen in his possession; the Court made the rule absolute, ordering the defendant to produce the agreement if he had it, or, if he had it not, to produce the copy to be stamped; and the copy having been accordingly produced by the defendant, the Court ordered, that if the plaintiff should produce, at the trial, the copy of the agreement duly stamped, the defendant should not be permitted to produce the original agreement.

CHAPTER II.

IN the following chapter, it is proposed to treat of those practical general rules, which have been adopted by our Courts of Justice, for determining the extent, order, or sufficiency of proof, and for regulating the cause and conduct of the proceedings. The rules, here chiefly considered, are those which bear upon the following subjects:—the obligation of a party to prove or disprove points in issue—the right of a party to begin—the right to give evidence in reply—the proof of the substance of an issue—the effect of a particular of demand, or of a set-off, in restricting proofs—the mode of examining or questioning a witness in particular cases—and the form of objecting to the decision of a Judge by a bill of exception or demurrer to evidence.

SECTION I.

Of the Party, who is to prove or disprove the point in issue.

A determination of the question, as to the party on whom the *onus probandi* rests in all cases, would involve an inquiry into the whole body of the law. It will be sufficient, for all practical purposes, to confine the inquiry to those general rules which have been adopted for ascertaining, whether the

plaintiff or defendant will have to prove the issue joined on the record. One rule is, that the point in issue is to be proved by the party who substantially asserts the affirmative,—according to the maxim of the civil law, “*Ei incumbit probatio qui dicit, non qui negat.*”

Affirmative of the issue to be proved.

It is, however, necessary to look to the substance, and not to the form of the issue: for in many cases, a party, by making a slight change in the form of his pleading, might make the issue affirmative or negative, at his pleasure. (1) The rule may also be modified or altered, where by law a presumption arises in favour of the party who makes the positive averment, or where the facts are peculiarly within the knowledge of a party. A few instances will be sufficient to illustrate this doctrine.

In an action for a loss, occasioned by barratry in the master of a ship, where it was objected by the defendant, that the plaintiff ought to prove, that the master was not also the owner or freighter, and that he did not act under the direction of the person who was, (in which case barratry could not be committed,) the Court held, that, if the master was owner or freighter, or acted under the direction of the owner, the burthen of proving that fact lay on the defendant. (2) “It was not incumbent on the plaintiff,” said Mr. Justice Buller, “to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was; proof of that fact, which operates in discharge of the other party, lies upon him.”

Action for loss by barratry.

Where one party charges another with a culpable omission or breach of duty, the rule, above laid down, does not apply. In such a case, the person who makes the charge is bound to prove it, though it may involve a negative; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary is proved. Thus, in a suit for tithes

Charge of breach of duty.

Reading thirty-nine articles.

(1) By Lord Abinger, C. B., in *Sower v. Leggatt*, 7 C. & P. 613.

(2) *Ross v. Hunter*, 4 T. R. 33, 38.

Putting on
board combustibles.

Covenant to
repair.

Procs. for
coursing with-
out consent.

in the Spiritual Court, where the defendant pleaded, that the plaintiff had not read the thirty-nine articles, the Court called on the defendant to prove the fact, though a negative : upon which, he moved the Court of King's Bench for a prohibition ; but it was refused, for the reason already stated. (1) In an action by the owner of a ship against the defendants, for putting on board a quantity of combustible and dangerous articles, "without giving due notice thereof," the Court held, that it lay upon the plaintiff to prove this negative averment. (2) In an action, for the recovery of penalties, under the hawkers' and pedlars' act, (3) against a person charged with having sold goods by auction, in a place in which he was not a householder, some proof of this negative, namely, of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. And in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises well repaired at the end of the term, the proof of the breach lies upon the plaintiff ; this breach, though in terms it involves a negative, admits of as easy proof, as if it had been expressed in the affirmative.

On the trial of an indictment on the statute 42 G. 3. c. 107, s. 1., which makes it felony to course deer on an inclosed ground "without the consent of the owner of the deer," it ought to appear from the evidence produced on the part of the prosecution, that the owner had not given his consent. According to the report of a late case, (4) it seems to have been thought necessary to call the owner of the deer, for the purpose of disproving his consent ; and the owner not being called, the jury were directed to find a verdict of acquittal. The particular cir-

(1) *Monke v. Butler*, 1 Roll. Rep. 83, cited by Lord Ellenborough, 3 East, 199. *Powell v. Millbank*, 2 Black. Rep. 851, S. P. 3 Wils. 355, S. C. See also Lord Halifax's case, Bull. N. P. 298. *Rex v. Combs*, Comb. 57. Gilb. Ev. 132.

(2) *Williams v. East India Comp.* 3 East, 193, 199. *Rex v. Hawkins*, 10 East, 211.

(3) St. 29 G. 3. c. 26, s. 4.

(4) *Rex v. Rogers*, 2 Campb. 654, by Mr. Justice Lawrence. See *Rex v. Mallinson*, 2 Burr. 679. *Rex v. Corden*, 4 Burr. 2279.

cumstances of that case are not stated in the report; and it is not easy to discover upon what principle such evidence was held to be indispensable. If the circumstances were of such a nature as to raise a reasonable presumption, that what had been done had not been done illegally (which, however, it is difficult to conceive), then, doubtless, the direct evidence of the owner would be necessary to repel that presumption, and to establish the charge against the prisoner. But, as a general proposition, it may be safely laid down, that the non-consent of the owner may be properly inferred from the conduct of the prisoner, and the circumstances under which the act was done, such as the secrecy of the proceedings, the attempt to conceal, the disguise of the prisoner, or his resistance, or any other circumstance of guilt; and that the evidence of the owner, to negative the supposition of his consent, is not more strictly necessary on this prosecution, than on a charge of larceny, in which it is an essential ingredient, that the goods should have been taken against the owner's consent; and yet the owner is never questioned as to that point, though he is generally called to prove the property.

Where the presumption of law is in favour of the defendant's plea, there it will be incumbent on the plaintiff to disprove the plea, though in so doing he may have to prove a negative. (1)

Presumption of law.

It is a general rule of evidence, that the burthen of proof lies on the person, who has to support his case by proof of a fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. (2) In an action by the assignees of a bankrupt, where the defendant, under a notice of set-off, gave in evidence promissory notes dated before the bankruptcy, the Court held that he ought also to show, that the notes came to his hands before that time. (3) In an action on

Fact peculiarly within the knowledge of a party.

Receipt of notes.

(1) As to the doctrine of presumption, see *ante*, Part II. c. xx. p. 456.

(2) 4 Barn. & Ald. 140. 9 Price, 257. 5 Maule & Selw. 211. 1

Barn. & Cress. 150. 3 Barn. & Cress. 242.

(3) *Dickson v. Evans*, 6 T. R. 57. See other examples in criminal cases, in 2 East, P. C. 782.

Qualification.

the game laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified; yet it is not necessary to disprove his qualifications; but it will be for the defendant, if he can, to prove himself qualified. (1) And it has been determined by the Court of King's Bench, that the same rule of evidence applies as well to proceedings on informations before magistrates, as to actions for penalties; and that a conviction, which specifically negatives the several qualifications mentioned in the statute, is sufficient, without stating evidence to negative those qualifications. (2) If such negative evidence were necessary to support the information, it would scarcely be possible in any case to convict, in consequence of the great number of distinct heads of qualification, which are enumerated in the statute. On the other hand, all the qualifications specified are peculiarly within the knowledge of the qualified person. If he is entitled to any such estate as the statute requires, he may prove it by his title-deeds, or by the receipt of the rents and profits; or if he is the son and heir apparent, or servant to any lord or lady of a manor, and appointed to kill game, that will be a good defence. All these qualifications are peculiarly within the knowledge of the party himself; but the prosecutor has probably no means of proving a disqualification.

Plea of infancy.

Although, in general, it is necessary for a party, who brings an action, to prove all the material facts, which he alleges in support of his claim, yet where the defendant pleads a fact within his own knowledge in discharge of himself, and the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burthen of the proof lies on the defendant, not upon the plaintiff. Thus, in an action of assumpsit, where the defendant pleaded infancy, and the plaintiff replied, that "the defendant, after he had attained his full age, ratified and confirmed the promise and undertaking,"

(1) By Lord Mansfield, in *Spiers v. Parker*, 1 T. R. 144. Buller, J., in 1 T. R. 649. Heath, J., in *Jelfs v. Ballard*, 1 Bos. & Pull. 468. Chambre, J., in *Frontine v. Frost*,

2 Bos. & Pull. 307, adm. *per cur.* in *Rex v. Stone*, 1 East, 650.

(2) *Rex v. Turner*, 5 Maule & Selw. 206.

the Court held, that the mere proof of a promise to pay was sufficient on the part of the plaintiff; and that it was for the defendant to prove the personal incapacity to contract, on which he grounded his defence, and which lay so peculiarly within his own knowledge. (1)

On a trial for bigamy, the register of the first marriage being produced, which stated the marriage to be by licence, without stating it to be by consent of parents or guardians, the prisoner in his defence proved, that he was an infant at the time of the marriage; and it was held, that this made it necessary, on the part of the prosecution, to give some evidence of the consent required by the marriage act. (2) Any subsequent countenance given by the parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent. (3)

Pros. for
bigamy.

In general, whatever the length of the pleadings may be, the determination, as to the burthen of proof, must depend upon the ultimate issue joined between the parties, without regard to admissions previously made on the record. It appears to have been decided, with reference to an issue joined on one only of several facts, which together constitute an answer to the action, that the neglect or inability to traverse the other facts involved in the answer cannot be treated as proof of those facts, so as to have the same effect, (with regard to the general rule,) which the actual proof of the facts by evidence would be allowed to have.

Admissions on
the record.

In the case of *Edmunds v. Groves*, (4) in an action by the indorsee against the maker of a promissory note, the defendant pleaded, that the consideration of the note was money lost at gaming, that it was indorsed to the plaintiff with notice, and without any consideration for the indorsement: the plaintiff

(1) *Borthwick v. Carruthers*, 1 Cr. C. 61.
T. R. 648.

(2) *Butler's case*, Russ. & Ry.

(3) *Ibid.* in note.

(4) 2 M. & W. 642.

replied, that the note was indorsed to him without notice, and for a valuable consideration. At the trial, both parties refusing to give any evidence, Lord Abinger directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. A motion was made accordingly, on the ground that the replication admitted the original defect of consideration, and that therefore, the *onus probandi* was thrown on the plaintiff. The rule was refused. It was assumed, for the purpose of the decision, that *proof* of the note having been given for a gaming debt would be sufficient to call upon an indorsee to prove a new consideration; and Lord Abinger rested his decision on the ground, that the fact of notice of the gaming transaction was involved in the issue, and that it was, at all events, necessary for the defendant to prove that fact, in order to call upon the plaintiff for proof of a new consideration. The Lord Chief Baron declined giving any opinion upon the effect of an admission on the record upon the *onus probandi* of an issue subsequently joined, but Alderson, B., said "an admission on the record is merely a waiver of requiring proof of those facts which are not denied, the party being content to rest his claim on other facts in dispute; but if any inferences are to be drawn by the jury, they must have those facts proved like any others." The question on which this learned Judge gave his opinion can never arise again in a similar case, if the plaintiff adopt the proper replication, (that technically called *de injuriâ sud.*) the effect of which is to put the whole plea in issue. It should also seem that the plea was double, for if the plaintiff took the bill with notice of an illegality in its inception, he would not obtain a title by giving a new consideration. If the plea were simply that the bill was obtained from the defendant by fraud, and indorsed to the plaintiff without consideration, and the plaintiff replied that it were indorsed to him for a good consideration, a decision that the *onus probandi* was on the defendant, would depend on the position taken by Mr. Baron Alderson.

The general principles of the doctrine of protestation, as laid down in the old authorities, appear to support the view of the learned Judge. When a party was driven to admissions

by the rules of pleading prohibiting a duplicity in the issue, the usual practice, for avoiding the being concluded by such admissions in other suits, was to protest against the truth of such admitted facts; so far as the immediate suit was concerned, it was said, the protestation was of no avail. The rule of H. T. 4 W. 4, seems only to have dispensed with the formality of a protestation. If the issue joined be found against the party making such admissions on the record, they are as conclusive in a subsequent action as if the facts had been found by a jury. (1) The rule, that a protestation has no effect in the particular action, seems to mean nothing more than that it can have no effect in putting the protested matters in issue; it contributes indeed, to one great object in pleading, that of narrowing and ascertaining the point to be tried, but, this being effected, all the surrounding facts set out in the pleading may, for the purpose of trial, be considered as if they were struck out of the record.

SECTION II.

Of the right to Begin and Reply.

The rule as to the right to begin is in practice of some importance, as upon it depends the still more important right to reply,—if the other party adduce evidence in opposition to that which is first given. Every advocate feels, the advantage of a reply is so great, as generally to decide the verdict, when the proofs are pretty nearly balanced between the parties; and this advantage is the greater, inasmuch as the Court above will not interfere with the decision of the Judge at *nisi prius* upon such a point. (2)

(1) See *Holdipp v. Otway*, 2 Wms. Saund. 103, *a. n.* (1).

(2) *Hare v. Nunn*, M. & M. 241. *Fowler v. Coster*, *ib.* *Burrell v. Nicholson*, 6 C. & P. 202. 1 M. & R. 304, S. C. *Williams v. Davies*, 1 Cr. & M. 464. *Scott v. Lewis*,

7 C. & P. 347. If, however, the Judge's decision is founded on an inversion of the *onus probandi*, and he makes the same error in directing the jury, that would be a ground of a motion for a new trial.

General rule. The general rule is, that the party, on whom the *onus probandi* lies, is entitled to begin.

The rule, as laid down by Mr. Baron Alderson, in the case of *Amos v. Hughes*, (1) supplies a test for ascertaining who is the party to begin, which appears to be the most precise, and of the easiest application in practice. That learned Judge, in the case before cited, stated the rule to be,—that the party, against whom the verdict would be, if neither give any evidence, is the party who ought to begin. In that case, an action of assumpsit was brought for a breach of a contract to emboss calico in a workmanlike manner, the allegation of the breach in the declaration being, that the defendant did not emboss, &c. The plea, on which issue was joined, was, that the defendant did emboss the calico in a workmanlike manner. A question being made, whether the plaintiff or the defendant should begin, Alderson, B., held, that the plaintiff had the right. “Questions of this kind,” said the learned Judge, “are not to be decided by simply ascertaining on which side the affirmative, in point of form, lies; the proper test is, which party would be successful, if no evidence at all were given. Now, here, supposing no evidence to be given on either side, the defendant would be entitled to the verdict, for it is not to be assumed that the work was badly executed; therefore, the burthen of proof lies on the plaintiff.”

Actions on bills and notes.

In actions on bills of exchange and promissory notes, and on bankers' cheques, if the pleas of the defendant impeach the consideration, the *onus probandi* is on the defendant (2); the law presumes that they were given for a good consideration, unless the contrary be proved. Nor does it make any difference in such a case, that the affirmative of the issue is, in point of form, on the plaintiff; as, if he take issue on a plea that

(1) 1 M. & R. 464. See also in *Mills v. Barber*, 1 M. & W. 427, the interlocutory remarks of the judges.

(2) *Easton v. Pritchett*, 1 C. M. & R. 798. *Lacy v. Forrester*, 2 C. M. & R. 59. *Mills v. Oddy*, *ib.* 103.

there was no consideration for the bill, note, or cheque. (1) In these cases, it is clear that the defendant has the right to begin, if the rule above laid down by Alderson, B., be the correct one: and there are decisions expressly in point which support the defendant's right to begin (2); though formerly it was not unusual at *nisi prius* for the plaintiff to be allowed to elect to begin, and give anticipatory evidence in contradiction of the defence set up by the pleas. But since the decision of the case of *Mills v. Barber*, (3) the practice appears to have been invariably the other way.

An issue taken on the amount, which the plaintiff is entitled to recover, must in many instances give him the right to begin; the claim to an amount, above that confessed by the pleas of the defendant, stands in the same position for this purpose, as if that were the only claim on the record, and were denied by the defendant. But in order to entitle the plaintiff to begin on this ground, it is not sufficient, that the claim appears upon the record to be larger than that confessed and avoided by the pleas; otherwise it would almost always be in the power of the plaintiff to secure the right to begin: but the judge must be satisfied at the trial, that there is a *bona fide* intention to give evidence in support of a larger claim than that confessed on the record. (4)

In what cases proof of damages or amount of claim entitles the plaintiff to begin.

In some cases, though the pleas go to the whole of the plaintiff's claim, the plaintiff will be entitled to begin, and may prove the amount of damages claimed by him, in the event of a verdict passing in his favour on the special plea. The practice, as to this exception to the general rule, having been very unsettled, the judges agreed to pronounce a rule

Exception to general rule in actions for personal injuries.

(1) *Ibid.*

(2) *Smart v. Rayner*, 6 C. & P. 721. *Mills v. Oddy*, *ib.* 728. *Faith v. M'Intyre*, 7 C. & P. 44.

(3) 1 M. & W. 427.

(4) *Harman v. Thompson*, 6 C. & P. 717. *Smart v. Rayner*, 6 C. & P. 721. On somewhat the same

principle, it has been held in trespass, that on *not guilty* being pleaded as to the *vi et armis*, and a special plea in confession and avoidance as to the residue, that the defendant is entitled to begin. *Jackson v. Hesketh*, 2 Stark. 521.

Proof of
damages.

Rule of the
Judges.

on this subject, and it was laid down by Tindal, C. J., in the case of *Cartier v. Jones*. (1) There was no written promulgation of the resolution of the judges; it is to be found only in the *nisi prius* reports, and these differ in their statement of it. In the report in 6 C. & P., the rule is stated as follows:—"The judges have come to a resolution, that justice would be better administered by altering the rule of practice, and that in future the plaintiff should begin in all actions for personal injuries, and also in actions for libel and slander, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. It is most reasonable that the plaintiff, who brings his case into Court, should be heard first, to establish his complaint." In the report in 1 M. & R., the rule is thus stated:—"A resolution has recently been come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained account, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." Cases since decided shew, that the latter version of the rule cannot be supported to its full extent. It is not sufficient to bring a case within the rule, that the amount claimed should be "unliquidated." In *Reeve v. Underhill*, (2) which was an action of covenant to recover damages for the breach of a contract not under seal, the plea was, that the deed was obtained by fraud, and an issue being joined upon it, the defendant claimed the right to begin; on behalf of the plaintiff it was contended that the case came within the new rule, as one of unliquidated damages; but Tindal, C. J., ruled the contrary. The learned Judge said, "I am of opinion that the present case is not within the rule; that rule applies to actions for libel, words, malicious prosecutions, and similar cases. It can hardly be said in any case, where the action is for the breach of a special agreement, that the damages are precisely ascertained; but here the amount

(1) 6 C. & P. 641. 1 M. & R. 281. S. C.

(2) 6 C. & P. 773. 1 M. & R. 440, S. C. R. acc. by Coleridge, J., in *Lewis v. Wells*, 7 C. & P.

221; by Parke, B., *Wooton v. Barton*, 1 M. & R. 518, *contra*, by Denman, C. J., in *Absolon v. Beaumont*, 1 M. & R. 441.

is, after all, a mere matter of calculation, and not liable to be increased by any matter that the plaintiff can urge in aggravation; it is otherwise in actions of libel, slander, and other cases where the action is brought for malicious injuries." And in *Wooton v. Barton*, (1) it was expressly said by Parke, B., in a similar case, "that the only rule laid down by the Judges was, that in actions for personal injuries, where damages are sought, as in actions of assault, &c., (2) and in libel and slander, the plaintiff should begin." Nor does an action of trover appear to be within the rule. (3) On these authorities, it appears that the rule does not apply to cases in which the damages, though in strict legal language unliquidated, may be ascertained by some measure of calculation, to which the facts may be applied; and the rule seems to be confined to cases where compensation is sought for a personal injury.

Proof of damages.

If the action be for a personal injury, it is not necessary that it should be in form *ex delicto*; in many instances compensation is sought for what is in substance a tort, though in the action it may assume the form of a mere breach of contract; and the rule has been held to apply in one case, where the complaint was in substance, as well as in form, a breach of contract, namely, in an action for breach of promise of marriage. (4)

Actions need not be *ex delicto*.

In trespass *quare clausum fregit*, the plea being of a right of way, it was held, before the promulgation of the new rule, that the defendant was entitled to begin; (5) and it should seem, that this case would not be considered within the new rule.

If the rule laid down by the Judges is to be considered as

(1) 1 M. & R. 518.

(2) Action for false imprisonment held within the rule, by Gurney, B., in *Atkinson v. Warne*, 6 C. & P. 687.

(3) *Vide Scott v. Lewis*, 7 C. & P. 347.

(4) By Gaselee, J., after consulting Lord Abinger, *Harrison v. Gould*, 7 C. & P. 580. There is, however, an expression of Cole-

ridge, J., in *Lewis v. Wells*, 7 C. & P. 221, which would imply that the rule does not apply in any action in form *ex contractu*.

(5) *Hodges v. Holder*, 3 Campb. 366. *Jackson v. Hesketh*, 2 Stark. 518. *Cottin v. James*, M. & M. 270. 3 C. & P. 605. All these cases were before the new rule, and it seems that the decision in them would not be altered by it.

Proof of
damages.

a definition of the class of cases in which proof of damages will entitle the plaintiff to begin, though the *onus probandi* of the issue is not on him, and not to be considered as a declaration of his right in cases where it was before doubtful, the two following cases would appear to be overruled by it. In *Roby v. Howard*, (1) in assumpsit, there was an issue on a plea in abatement for non joinder, and it was held, that the plaintiff was entitled to begin. So also in *Lacon v. Higgins*, (2) where issue was joined on a plea of coverture.

In *Fowler v. Custer*, (3) Lord Tenterden came to a decision which appears to be opposed to the two cases above cited, and in accordance with the rule afterwards propounded by the Judges. In an action on a bill of exchange, the defendant pleaded a non-joinder in abatement, and Lord Tenterden held, that the defendant was entitled to begin, assigning as the reason of his decision, "that wherever it appears by the record, or by the statement of the counsel engaged, that there is really no dispute about the sum to be recovered, but the damages are either nominal, or else mere matter of computation, then, if the affirmative of the issue is on the defendant, he is entitled to begin."

The following cases are evidently contrary to the new rule. In *Barell v. Russell*, (4) in an action for assault and battery, in which the plea was, that the defendant was captain of a ship, and the plaintiff a mariner in it, and guilty of mutiny, and the replication was *de injuriâ*, &c., it was held, that the defendant was entitled to begin. The same point was ruled in *Cooper v. Wakley*, (5) which was an action for a libel, imputing to the plaintiff unskilfulness as a surgeon, and the defendant pleaded in justification of the libel.

(1) *Roby v. Howard*, 2 Stark. N. P. C. 555.

(2) 3 Stark. N. P. C. 178.

(3) M. & M. 241 Same principle applied to actions for nominal damages, see the cases cited *supra*, note (2). Action for false return to mandamus, to admit plaintiff

as parish clerk, plaintiff not entitled to begin to prove damages. By Lord Denman, *Bowles v. Neale*, 7 C. & P. 260, since the new rules.

(4) 1 R. & M. 293.

(5) M. & M. 248, 3 C. & P. 474.

It must be observed, that these cases, as well as those above cited of *Hodges v. Holder*, *Jackson v. Hesketh*, and *Cotton v. James*, (1) which were decided before the new rule was pronounced, seem to overrule altogether the doctrine, that the right to prove damages, whether liquidated or not, entitled the plaintiff to begin; and if that be so, the new rule must be considered as a declaration of the only cases in which the proof of damages will give that right to the plaintiff, where the *onus probandi* of the issue is not on him.

If there be several issues on the record, as to some of which the *onus probandi* is on the plaintiff, and as to others on the defendant, it seems that the plaintiff is entitled to begin. (2) And the same rule applies as well in actions of replevin, as in other cases.

Where there
are several
issues.

As the action of ejectment is to be considered under the control and power of the Court for the advancement of justice, the Court may so regulate its proceedings as may best advance that object, and therefore, though, if we look to the record alone, the burthen of proof is always on the plaintiff, (3) the Judge at *nisi prius* will ascertain the real issue to be decided, and in his discretion determine, on whom lies the proof. In an action of ejectment brought by an heir-at-law, if the defendant's counsel admits his title, admitting also the fact, that his ancestor died seised, and sets up a new title in opposition to it, as devisee, or grantee, he will be allowed to begin. In an ejectment, (4) where the lessor of the plaintiff claimed under the will of a person who died seised, and the defendant under a subsequently executed codicil to the same, it was held by Bayley, J., that on admitting the title of the lessor of the plaintiff under the will, he was entitled to begin. That learned Judge said, "The devisee named in the codicil stands in the same relation to the

Of the rule in
ejectment.

(1) *Supra*, 637, note (5).

(2) *Curtis v. Wheeler*, M. & M. 493. 4 C. & P. 198. *Williams v. Thomas*, 4 C. & P. 234. *James v. Salter*, 1 M. & R. 501.

(3) A special plea in ejectment is unknown in practice.

(4) *Doe d. Corbett v. Corbett*, 3 Campb. 368.

devisee named in the will, as the devisee named in the will does to the heir-at-law." In the case of *Doe d. Warren v. Bray*, (1) the lessor of the plaintiff claimed as heir-at-law, the defendant, who was his younger brother, contended that the lessor of the plaintiff was illegitimate, and admitting that he was heir-at-law, if legitimate, contended that that admission gave the defendant the right to begin. But Vaughan, J., ruled that the *onus probandi* was on the plaintiff, to prove that he was heir-at-law. In the case of *Doe d. Wollaston v. Barnes*, (2) ejectment was brought to recover premises of which John Clavell died seised. After his death, Sophia Richards, his sister and heiress, took possession, and died, leaving a will of the property in question. The lessors of the plaintiff were the devisee of Sophia Richards, and her heir-at-law, who was also heir-at-law of John Clavell. Lord Denman ruled, that the defendant was entitled to begin, by making admissions, that John Clavell died seised, that Sophia Richards was his heiress, and had possession of the property from the time of his death, that the plaintiff was heir-at-law of John Clavell and of Sophia Richards, and that the plaintiff was entitled to the property, unless he (the defendant) proved the will of John Clavell. Lord Denman said, "It is the duty of a Judge, in cases of this sort, to decide the right to begin, as far as can be, on some certain principle. If, instead of the general form and statement in ejectment, the titles had been deduced in the pleadings, the issue must have been on the will, and I think that is the correct mode of trying the question. I remember a case at Nottingham, in which I was for the defendant, claiming under a will: the plaintiff claimed under a prior will, which I admitted, and was allowed to begin." It seems that the rule laid down by Lord Denman will be generally followed. In a case (3) where the analogy of ejectment to other actions and to the consequent action for mesne process was fully considered, (and where it was held, that a previous recovery in ejectment was not conclusive evidence of the title of the plaintiff in an action of trespass

(1) M. & M. 166.

(2) 1 M. & R. 386.

(3) *Doe v. Huddart*, 2 C. M. & R. 316.

for mesne profits,) Bolland, B., said, in delivering the judgment of the Court, "It has been urged, that the action of ejectment is a creature of the Court, and that, therefore, there is a sufficient ground of distinction; but it would surely be more reasonable to conclude, that the Courts, in creating these actions, would, as far as possible, follow the course in other actions, and not unnecessarily create an anomaly to the general rules of evidence upon trials."

In the case of *Doe d. Smith v. Smart*, (1) the plaintiff claimed as heir-at-law, and as to part of the property as assignee of an outstanding term, and the defendant, who claimed as devisee, refused to admit the assignment; Gurney, B., after consulting Patteson, J., ruled nevertheless, that the defendant was entitled to begin. "The real question in dispute is the validity of this will. The mischief would be extremely great, if a party, by merely getting an outstanding term, should obtain an advantage to which he is not really entitled."

It may be convenient here to mention the case of *Goodtitle d. Rivett v. Braham*, (2) in which the lessor of the plaintiff claimed as heir-at-law, and the defendant as devisee; the report states, that "at the outset of the cause, a question arose, who was entitled to the general reply? and the Court decided, that if the plaintiff proved his pedigree and stopped, and the defendant set up a new case, which the plaintiff answered by evidence, the defendant should have the general reply. It may be observed, that the right to the general reply usually attends the right to begin. In this case, it does not appear, whether the defendant was called upon to admit the plaintiff's title under penalty of losing the right to begin; but since the practice is clearly settled as to the effect of such admissions, it may be doubted whether, after putting the plaintiff to prove his case, the defendant would now be held entitled to the general reply.

(1) 1 M. & R. 476.

(2) Decided in 1792. 4 T. R. 497.

Of the right to
give evidence
in reply.

The case of *Rosa v. Smith*, (1) was an action of trespass for breaking and entering the plaintiff's house, and seizing and converting the furniture. The defendant pleaded the general issue, with two special pleas of justification, alleging that his goods had been clandestinely and fraudulently removed to avoid a distress for rent. The replication took issue upon the fact of fraudulent and clandestine removal. On the part of the plaintiff, a *prima facie* case of trespass was proved as alleged, and the defendant then went into evidence, in order to shew, as stated in the pleas, that the removal was fraudulent and clandestine. General evidence being afterwards offered by the plaintiff, to shew that the removal was not fraudulent and clandestine, Lord Ellenborough was of opinion, that it was not competent to the plaintiff, in that stage of the cause, to enter into such evidence, since all the circumstances were in issue, and the removal might have been proved to have been *bona fide* in the first instance: that the general rule was, that when by pleading, or by means of notice, the defence was known, the counsel for the plaintiff was bound to open the whole case in chief, and could not proceed in parts; and, therefore, that the plaintiff in this case should at once have proceeded to his evidence, to repel the inference of a fraudulent removal, and to shew that it had been in contemplation of the party to change his residence previously. His Lordship afterwards added, "As a general rule, I beg it may be understood, that a case is not to be cut into parts, but when it is known what the question in issue is, it must be met at once. If, indeed, any one fact be adduced by the defendant, to which an answer can be given, the plaintiff must have an opportunity given for so doing; but this must be understood of a specific fact; he cannot go into general evidence in reply to the defendant's case. There is no instance in which the plaintiff is entitled to go into half his case, and reserve the remainder."

A contrary practice seems to be now established, on the

(1) 2 Stark. N. P. C. 31.

authority of several rulings by Lord Tenterden. (1) Indeed, since the recent alteration of the rules of pleading, by which very numerous issues are raised on the record, a strict adherence to Lord Ellenborough's rule would lead, on the one hand, to great injustice, if the consequence were, that the plaintiff should be shut out, from offering evidence in answer to the defendant's case; on the other hand, a great waste of time would be caused by receiving the plaintiff's evidence upon issues, which, it may turn out, the defendant is quite unable to prove. (2)

The practice however is, that the plaintiff may elect to give such evidence, and, if he elect, he is bound to go into his whole case. If he undertake to repel the defendant's plea, he must go through all the evidence, which he proposes to give for that purpose. It is much more convenient for the due administration of justice, that that course should be adopted, otherwise there would be no end to evidence on either side, as the defendant would be entitled, to call witnesses to answer those last produced by the plaintiff, to rebut the justification. (3) Still, however, it is apprehended that this rule must be taken with the qualification, which Lord Ellenborough's rule admitted, namely, that where the defendant proves a specific fact, as evidence in support of an issue, the plaintiff may give evidence in contradiction to that fact; in the majority of cases, the plaintiff could not be reasonably called upon to give such contradictory evidence by anticipation, nor could he foresee that such a fact would be proved.

When evidence is adduced by both parties, the general rule is, that the party who begins is entitled to reply, and in replying he is not restricted to a comment on the evidence advanced in opposition to his case, but may remark upon the whole of the evidence before the Court. If evidence is called by the plaintiff in reply to that given by the defendant, the latter has the right

*Of the general
right to reply.*

(1) *Browne v. Murray*, R. & M. 254. *Sylvester v. Hall*, *ib. n.*

(2) See *Williams v. Davies*, 1 C. & M. 464.

(3) By Lord Tenterden, in *Browne v. Murray*. R. acc. by Park, J., in *Roe, Bart. v. Day*, 7 C. & P. 707.

to remark upon that evidence, but not to comment generally on the case. If in answer to the case made by the party who begins, the other party offers no evidence, the former has no right of reply; he is, however, said to have such a right, if the improper course be pursued of stating new facts, though no evidence be given in support of the statement; (1) but this privilege to reply must be always subject to the discretion of the judge, and is not claimable as a matter of right. (2) In a recent case, (3) where the counsel for the defendant, having proved a document in cross-examination, read it in the course of his address to the jury, without putting it in evidence, Parke, B., on the right to reply being claimed, said, "I have often heard it threatened, that if a counsel or a party opened new facts, the opposite side would have the reply, but I never heard such a reply actually made." The learned Judge intimated his opinion, that in good faith the document ought to be put in: the defendant's counsel put it in accordingly, and the plaintiff replied.

Criminal cases. The rule in criminal cases differs from that in civil, from the circumstance, that as the crown is always a party, the counsel for the prosecution have in strictness the right to reply, whether evidence be adduced in defence or not. (4)

(1) See *Rex v. Horne*, 20 How. St. Tr. 662. *Rex v. Bignold*, 4 D. & R. 70. *Rex v. Carlisle*, 6 C. & P. 636.

(2) *Crerar v. Sodo*, M. & M. 85. 3 C. & P. 10.

(3) *Faith v. McIntyre*, 7 C. & P. 44.

(4) Since the prisoner's counsel bill came into operation, the practice under it has been regulated by the following rules, agreed to by twelve of the judges, three of them being absent: 7 C. & P. 676.

Prisoners' counsel bill.

Rules.

I. That where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not con-

tained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel.

II. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness, as to any supposed contradiction or variance between the testimony of the witness in Court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

III. That the witness cannot, in

SECTION III.

The substance of the Issue to be proved.

With reference to the question, what will be sufficient proof of an issue, to entitle a party to a verdict upon the issue, it will be convenient to consider, in the first place, what are the rules which determine whether the allegations involved in the issue have been properly supported by evidence, or whether there is such a difference between the allegations and the evidence, as will constitute a variance;—and secondly, what are the cases in which there is a sufficient approximation of the evidence to the allegations, to enable the judge to amend the statement in the pleadings, so as to make it conformable with the evidence. In treating of these subjects, the term, *variance*, is to be understood to mean a fatal difference between the evidence and the pleading, unless the latter can be amended.

A general rule, governing the application of evidence to the points in dispute on any issue, is, that it must be sufficient to prove the substance of the issue.

cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in

either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

IV. If the only evidence called, on the part of the prisoner, is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do.

V. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner.

It is a general principle of evidence, that all the material facts in the declaration, which are put in issue, must be established by legal proof. Another principle is, that the nature and extent of the proof will depend upon the manner in which the alleged facts are introduced; allegations, which are merely matters of inducement, do not require such strict proof as those which are precisely put in issue between the parties. (1) Evidence, as Lord Mansfield used frequently to observe, is always to be taken with reference to the subject-matter to which it is applied, and to the person against whom it is used.

There are a great variety of examples, both in civil and criminal cases, which might be cited in illustration of the rule now under discussion. The object of the present section will be to make a selection of such examples as appear most generally useful.

Close in which is trespass. In an action of trespass, *quare clausum fregit*, if the issue be on a plea by the defendant, that the close, in which, &c., is his soil and freehold, he is entitled to the verdict if he prove the plea as to "the parts actually trespassed upon." (2)

Plea, *solvit ad diem*. In an action on a bond, if the defendant plead *solvit ad diem*, the issue will be maintained by proof of payment *before* the appointed day; and payment to a third person by the appointment of the plaintiff will be substantially payment to the plaintiff himself.

Covenant. In an action of covenant, when the breach assigned is, "that the defendant has not used a farm in a husbandlike manner, but on the contrary has committed waste," &c. to which the defendant pleads, "that he has not committed waste," &c., but used the farm in a good and husbandlike manner, and issue

(1) By Chambre, J., 1 New Rep. 210.

(2) *Stevens v. Whistler*, 11 East, 51. *Richards v. Peake*, 2 B. & C.

918. *Bassett v. Mitchell*, 2 B. & Ad. 99. *Tapley v. Wainwright*, 5 B. & Ad. 399.

is taken upon this, the plaintiff cannot give evidence of any unhusbandlike treatment of the farm, not amounting to waste ; for the issue is narrowed to this point. (1)

But, in general, in support of an allegation as to the extent of a breach of duty, or breach of contract, it is not necessary to give evidence of a breach to the full extent of the allegation in the declaration. In an action of waste, for cutting down a certain number of trees, proof that the defendant cut a smaller number is sufficient. On a similar principle it has been adjudged, that in an action on a policy of insurance of a ship, though the allegation be a total loss, the plaintiff may recover for a partial loss. (2)

Amount of injury.

In an action for an assault, if a plea of *molliter manus imposuit*, or *son assault demesne*, or moderate correction of an apprentice for sufficient cause, or other similar plea, be traversed by the republication *de injuria*, the substance of the issue is the cause of the trespass ; the degree of force used is immaterial. (3)

In an action against a sheriff, where the plaintiff declared, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and a special verdict found, that the husband alone was taken in execution (the execution being for a debt due from the wife before coverture), and that he escaped, the Court held, that the substance of the issue was proved, and gave judgment for the plaintiff. (4)

Action against sheriff.

In an action on a simple contract, whether *assumpsit* or debt, the plaintiff may prove and recover a less sum than he has demanded in the writ ; and for this reason, it has been held, that a declaration in such action is not bad for specifying

Assumpsit.

(1) *Harris v. Mantle*, 3 T. R. 307.

(2) *Gardiner v. Crasdale*, 2 Burr. 904.

(3) *Penn v. Ward*, 2 C. M. & R. 338.

(4) *Roberts and Wife v. Herbert*, 1 Sid. 5. S. C. cited Bull. N. P. 299.

a less sum, though the breach assigned is the non-payment of the whole sum demanded. (1)

Action for
slander.

In actions for slander, the Courts used at one time to hold, that the plaintiff was bound to prove the words spoken precisely as laid; but it is now settled that it will be sufficient, if the plaintiff prove some material part of the words alleged on the record. If the declaration contain several actionable words, the plaintiff will be entitled to a verdict on proving some of them. (2)

Replevin.

In an action of replevin, where the defendant avowed taking the cattle as damage-feasant, the plaintiff pleaded in bar, that one W. was seised of a house and land, &c., whereto he had common, &c., and demised the same to him to hold from a certain day next before for a year; the avowant traversed the lease *modo et forma*, upon which issue was taken; the jury found a special verdict, that W. made a lease to the plaintiff on the day stated, for a year; and the plaintiff had judgment, for although this is not the same lease as pleaded (since this begins on the day, and the other not so soon), yet the Court said, the substance of the issue is, whether or not the plaintiff had such a lease, as by force thereof he might have common at the time, and this appeared to be the case here. (3)

Action for
assault.

Constable's
district.

If the issue joined between the parties is, whether A. & B. were churchwardens, proof that one was, and the other was not, would not be sufficient. (4) So, where the declaration averred, that the plaintiff was constable of a particular parish, and that he was assaulted in the execution of his office as constable, and it appeared on the evidence, that he had been sworn in to serve for a whole liberty, of which the parish formed only a part, this was held to be a material variance. (5)

(1) *M'Quillin v. Cox*, 1 H. Bl. 249.

(2) *Compagnon v. Martin*, 2 Bl. Rep. 790.

(3) *Pope v. Skinner*. Hob. 72.

S. C. cited Bull. N P. 300. *Forty v. Imber*, 6 East, 434.

(4) Bull. N. P. 299.

(5) *Goodes v. Wheatly*, 1 Campb. 231.

If the plaintiff reply, to a plea of tender, that, before the cause of action and after the tender, he demanded the sum tendered, he will be obliged to prove, under the issue joined upon this replication, a demand of that specific sum. The proof of a demand of a *larger* sum would not support the issue. (1)

Plea of tender.

The same general rule of evidence applies, if possible, still more strongly to the case of criminal prosecutions than to civil suits. It is an universal principle, which runs through the whole of the criminal law, that it will be sufficient to prove so much of the indictment, as charges the defendant with a substantive crime. If the indictment charges, that the defendant did, and caused to be done, a particular act, it is enough to prove either the one or the other. If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. (2)

Examples in criminal cases.

Proc. for libel.

On an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged, proof of part of the pretence, and that the money was obtained by such part, is sufficient. (3)

False pretences.

On a charge of petit treason, if the killing with malice is proved, but no circumstances of aggravation are proved to make the offence treasonable, the prisoner may be found guilty of the murder. (4) On an indictment for burglary and stealing goods, if it appear that no burglary was committed, as where the breaking and entering were not in the night—or on a charge of robbery, where the property was not taken from the person by violence, or by putting him in fear—the prisoner may be found guilty only of the simple larceny. (5)

Petit treason.

Burglary.

Robbery.

(1) *Rivers v. Griffiths*, 5 Barn. & Ald. 630. *Spybey v. Hide*, 1 Campb. 181.

(2) *Rex v. Hunt*, 2 Campb. 583. *Rex v. Williams*, *ib.* 646. See also cases in 2 East, P. C. 515, 516.

(3) *Hill's case*, Russ. & Ry. Cr. C. 190.

(4) *Case of Swan and Jefferys*, Post. Cr. L. 104.

(5) 2 East, P. C. 513, 515, 516.

Murder.**Manner of death.**

On the trial of an indictment for murder, the jury may find the prisoner guilty of manslaughter only; for the principal matter is the killing, and the malice is only a circumstance in aggravation. (1) And if the manner or means of the death, proved at the trial, agree in substance with the means charged in the indictment, it will be sufficient: as, where the indictment is for killing with a dagger, and the evidence prove a killing with a staff; (2) or if the indictment be for killing with one sort of poison, and the evidence proves the killing with another; such evidence maintains the indictment, because the proof of the instrument, or of the kind of poison, is not absolutely necessary to the proof of the fact itself; (2) but if the charge is for poisoning, and the death is proved to have been caused by striking or starving, &c., this evidence would not support the indictment, as the species of death in the one case is totally different from that in the other. (3)

Principal.

If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is not a material variance, for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had all together struck the deceased. (4) The identity of the person, supposed to have given the stroke, says Mr. Justice Foster, is but a circumstance, and in this case a very immaterial one. The stroke of one is, in consideration of law, and in sound reason too, the stroke of all. They are all principals in law, and principals in deed.

Accessory.

If two persons are indicted as principals, and one is proved to be only accessory, he must be discharged on this indict-

(1) Mackalley's case, 9 Rep. 67, *b.*
Co Lit. 282, *a.* Gilb. Ev. 233.

(2) 9 Rep. 67, *a.* Gilb. Ev. 231.
1 East, P. C. 341. Rex v. Clark,
1 Brod. & Bing. 473.

(3) 9 Rep. 67, *a.* Gilb. Ev. 231.

1 East, P. C. 341. 2 Inst. 319.

(4) Mackalley's case, 9 Rep. 67,
b. 1 Plowd. 98. Wallis's case, 1
Salk. 334. Fost. Disc. 351. Towle's
case on at. 43 G. 3, c. 58. 3 Price
145. 2 Marsh. 466, S. C.

ment; (1) for in consideration of law their offences are quite different. And one indicted as accessory before the fact cannot be convicted upon evidence proving him to have been (principal in the second degree) present, aiding and abetting, at the fact. (2)

In *Mackalley's case*, (3) where the prisoner was tried for the murder of a serjeant at mace in London, the indictment charged, that the sheriff made a precept to the serjeant for the arrest, and it appeared upon the evidence, that there was no such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request on the entry of the plaint according to the custom of the city; and all the Judges held, that the variance between the indictment and the evidence was not material, because the warrant to arrest was only a circumstance, and the substance of the matter had been found, which was, that the prisoner killed an officer in the lawful execution of legal process. The Judges were also of opinion, that the indictment might have been general, (namely, that the prisoner feloniously and of his malice propense killed, &c.) and that the special matter might have been given in evidence; and since the indictment in the principal case contained such an averment, they held that the charge of murder had been proved, notwithstanding that the special matter, given in evidence, might vary in substance from the special matter contained in the indictment.

Murder of officer in execution of his office.

A great variety of cases occur in the books with respect to the necessity of proving averments in pleading. Immaterial averments need not be proved. It is a general rule, that a discrepancy between the allegation and the proof is immaterial, unless it be in respect of matter which, if pleaded, would be material. (4) If it be in respect of a matter not essential to maintain the action or the plea, it is of no importance. In an action upon a bill of exchange, when the declaration stated the bill to have been accepted and indorsed *before* it became due,

Averments material.

Variance.

(1) Gilb. Ev. 232. See Fost. Cr. L. 361.

(2) Gordon's case, 1 East, P. C. 352.

(3) 9 Rep. 61, b. 67, a. 68, a.

(4) 3 Barn. & Cress. 122, by Lord Tenterden, Ch. J.

Averments
material.

and the proof was, that it was indorsed *after* it became due, the Court held it was no variance; because it was immaterial, whether the bill was indorsed before or after it became due; and therefore it was unnecessary to prove the indorsement precisely at the time when it was alleged. (1)

In tort.

The general rule of pleading in cases of tort is, that it is sufficient, if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is one exception, however, to this rule, which is, when the allegation contains matter of description. There, if the proof given be different from the statement, there is a variance. (2) Thus, in an action on the case, (3) for making a false and malicious charge of felony where the declaration stated that the defendant went before Richard Cavendish, Baron Waterpark, of *Waterfork*, a justice of the peace, and falsely charged the plaintiff with a felony, and it appeared in evidence that the charge was made before Richard Cavendish, Baron Waterpark, of *Waterpark*, the plaintiff was nonsuited. "*Non constat*," said Lord Tenterden and Mr. Justice Holroyd "but that a different person may have the title mentioned in the declaration."

In contract or
prescription.

It is quite enough in cases of tort, if the same ground of action is proved as is laid in the declaration, although not to the extent there stated. In cases of contract and prescription, it is different; for in the former, if all that is stated in the declaration be not proved, it is a proof of a different contract, and a different ground of action; the party therefore cannot be entitled to the judgment of the Court. In the latter case, when a prescription is alleged in bar, it is an entire thing, and must be proved to the extent laid. (4)

Inducement.

An averment, which is merely matter of inducement to the

(1) *Young v. Wright*, 1 Campb. 139.

(2) 2 Barn. & Ald. 363, by Lord Tenterden. 4 Barn. & Cress. 385.

(3) *Walters v. Mace*, 2 B. & Ald. 758.

(4) 2 Barn. & Ald. 366.

action, need not be proved with the utmost strictness and precision. Thus where an action was brought to recover double the value of goods, which had been removed for the purpose of preventing a distress, and the declaration stated a certain sum to be in arrear for rent, it was decided that the plaintiff was entitled to recover, although the notice of distress was for a less sum. (1) Here, whether the particular sum stated in the declaration was in arrear, must be perfectly immaterial: the damages were not to be measured by the quantity of rent, but by the value of the goods, which had been removed.

If an averment may be struck out without destroying the plaintiff's right of action, it will not be necessary to prove it; but it is otherwise, if the averment cannot be struck out without getting rid of a part essential to the cause of action: for then, though the averment be more particular than it need have been, the whole must be proved, or there is a fatal variance. (2) Thus, in the case of *Bristow v. Wright*, (3) which was an action against the sheriff for taking the goods of a lodger without leaving a year's rent, the declaration stated some particulars of the demise relative to the time of payment of rent, which were negatived by the evidence, and the Court held that the variance was fatal. There, it was necessary for the plaintiff, in order to show that he was landlord, to set forth a contract between himself and the tenant, and no part of the contract alleged could be struck out, because it was in its nature entire: though it was admitted, that the part of the contract, relating to the time of payment, need not have been averred.

Where averment may be struck out.

The case of *Williamson v. Allison*, (4) illustrates the other part of the rule, namely, that where an averment may be struck out, it need not be proved. That was an action on the case in tort, for the breach of a warranty in selling goods unfit for sale,

(1) *Gwinnet v. Phillips*, 3 T. R. 643. See another instance in *Stoddart v. Palmer*, 3 Barn. & Cress. 2, stated *infra*.

(2) By Lawrence, J., in *Williamson v. Allison*, 11 East, 452.

(3) 2 Doug. 664. See 5 T. R. 496. 2 East, 450, 452. 8 East, 9.

(4) 2 East, 466. See also *Peppin v. Solomon*, 5 T. R. 496. *Broomfield v. Jones*, 4 Barn. & Cress. 380.

Where averment may be struck out.

and the declaration averred, that the defendant knew the goods to be in an unfit state, of which fact there was no evidence at the trial; but the Court held, that such proof was unnecessary, for if the whole averment respecting the defendant's knowledge of the unfitness for sale were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved.

Bill of exchange.

In an action of assumpsit, (1) by the indorsee against the indorser of a bill of exchange, the declaration, in addition to the other requisites to charge the defendant, alleged, that the bill had been accepted. At the trial there was no proof of an acceptance, and it was held, that as the holder of a bill is not bound to present it for acceptance before it becomes due, and the acceptance or non-acceptance does not vary the responsibility against the indorser, it being at all events his duty to pay the bill if prior parties did not, the averment of acceptance was immaterial, and the plaintiff therefore not bound to prove it.

Indictment.

The same rule is applicable to averments in an indictment. If an averment may be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, it will be considered as surplusage, and may be disregarded in evidence. Thus where the prisoner was charged with a robbery near the highway, and the robbery was proved, but not near the highway (2)—where the robbery was averred to have been committed in the house of a certain person named, and the name of the owner was not proved (3)—and where the offence of arson was stated in the indictment to have been committed in the night-time, and was proved not to have been in the night-time, (4)—in these cases, all the Judges were of opinion, that the convictions were proper, and the prisoners were ousted of the benefit of clergy. But where the averment in

Robbery.

Arson.

(1) *Tanner v. Bean*, 4 B. & C. 312.

(2) *Wardle's case*, 2 East, P. C. 785. *Russ. & Ry. Cr. C. 9. S. C.*

(3) *Pye's case*, *Johnstone's case*,

2 East, P. C. 785. *Russ. & Ry. Cr. C. 9, S. C.*

(4) *Minton's case*, 2 East, P. C. 1021.

the indictment is sensible and material, it ought to be regularly proved; as, where the prisoner was indicted for a burglary in the house of J. D. with intent to steal the goods of J. W., and it appeared in evidence that no such person had any goods in the house, but that the name of J. W. was put by mistake for J. D., (1) the Judges held, that it was material to state truly the property of the goods, and on account of this variance the prisoner was acquitted.

Where the action is brought upon a contract, the contract ought to be stated correctly, and proved as laid; and if any part of the contract proved vary materially from that stated in the pleadings, the whole foundation of the action fails, since the contract is entire and indivisible. (2) If the contract, therefore, for the breach of which the action is brought, was in the alternative, at the option of the defendant, (as to deliver *this* or *that* quantity of goods at one time, and the remainder at another,) it ought to be so stated; for if the declaration states an absolute contract, and the proof is of a contract in the alternative, the plaintiff cannot recover, although the defendant may have determined his option. (3) In an action against a carrier, on a general undertaking to carry safely, proof of a contract, to carry safely, fire and robbery excepted, is a variance. (4) So in a case (5) where the plaintiff brought his

Variance in contract.

(1) *Jenk's case*, 2 East, P. C. 514.

(2) 1 T. R. 240. 3 T. R. 645. The following are the principal cases on this subject, decided before the statutes enabling the Judge to amend variances at the trial: *Bristow v. Wright*, 2 Doug. 664, (*supra*, p. 853, S. C.) *Carlisle v. Trears*, Cowp. 671. *Churchill v. Wilkins*, 1 T. R. 447. *Durston v. Tuthan*, cited 3 T. R. 67. *Little v. Holland*, 3 T. R. 590. *Hockin v. Cooke*, 4 T. R. 314. *Leery v. Goodson*, 4 T. R. 687. *White v. Wilson*, 2 Bos. & Pull. 116. *Penny v. Porter*, 2 East, 2. *Brown v. Sayce*, 4 Taunt. 320. *Pool v. Court*, 4 Taunt. 700. *Cohen v. Hannam*, 5 Taunt. 101. *Arnfield v. Bate*, 3 Maule & Sel. 173. *Squire v. Hunt*, 3 Price, 68. *Wildman v. Glossop*, 1 Barn. & Ald. 9. *Tucker*

v. Cracklin, 2 Starkie, N. P. C. 385. *Parker v. Palmer*, 4 Barn. & Ald. 387. *Strong v. Rule*, 3 Bing. 315. The following are cases on promissory notes and bills of exchange. *Whitwell v. Bennet*, 3 Bos. & Pull. 559. *Gordon v. Austin*, 4 T. R. 611. *Johnson v. Mars*, 2 Campb. 305. *Roche v. Campbell*, 3 Campb. 247. *Hodge v. Fillis*, 3 Campb. 463. *Hutchinson v. Piper*, 4 Taunt. 810. *Exon v. Russell*, 4 Maule & Selw. 505. *Mountstephen v. Brooke*, 1 Barn. & Ald. 224.

(3) *Penny v. Porter*, 2 East, 2, and see 2 East, 134. *Cooke v. Munstone*, 1 Bos. & Pull. N. R. 351.

(4) *Latham v. Rutley*, 2 Barn. & Cress. 20.

(5) *Jones v. Cowley*, 4 B. & C. 445.

action on the warranty of a horse, stating the warranty to be that the horse was sound, and it appeared upon the proof that the warranty was, that the horse was sound except a kick on one of it's legs, this was also held to be a ground of nonsuit, though the unsoundness which was proved, and for which the action was brought, had no relation to the leg.

Contract stated
in action of
tort.

This rule is not confined to actions of assumpsit. In an action of tort also, where the contract is necessary to be stated, in order to maintain the ground of action as laid on the record, the contract ought to be proved as stated. Thus in an action against two defendants for deceit, charged in the declaration to have been committed by them in a joint sale of their joint property, the Court of King's Bench held, as there was no evidence against one of the defendants, that the action could not be maintained against the other. (1) The joint contract here described, said Lord Ellenborough, in delivering the judgment of the Court, is the foundation of the joint warranty laid in the declaration, and essential to it's legal existence and validity; and it is a rule of law, that the proof of the contract must correspond with the description of it in all material respects.

What parts of
contract need
be stated.

It will not be necessary for the plaintiff to state all the several parts of a contract, which consists of distinct and collateral provisions; but it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of it's performance. (2) Thus, if there is a provision in the contract to discharge the party from all liability, in case a particular condition is not complied with, it ought to be set out and strictly proved: but it is otherwise, where the provision respects only the liquidation of damages on a breach of the contract; such a provision need not be stated in the pleadings. (2) In an action on the

(1) *Weall v. King*, 12 East, 452.
Green v. Greenbank, 2 Marsh. 485.
Lopes v. De Tastet, 1 Brod. & Bing. 538.

(2) *Clarke v. Gray*, 6 East, 564.
569. *Thornton v. Jones*, 2 Marsh. Rep. 287. *Parker v. Palmer*, 4 Barn. & Ald. 387.

case upon the warranty of a horse, if the plaintiff states truly the whole of the consideration for the promise of the defendant, (which, in the case referred to, was the re-delivery of the horse to the defendant,) and then states truly the substantive parts of the warranty, of the breach of which he complains, this will be sufficient, without averring other parts of the warranty entirely collateral and irrelevant to those stated. (1) In the case of *Gladstone v. Neale*, (2) the contract stated was for the purchase of a certain quantity of goods, ("to wit, eight tons,") and the contract proved was for the purchase of "about 8 tons," the exact amount not being known at the time of making the contract, but being ascertained before the action was brought; and it was determined at the trial, and afterwards by the Court of King's Bench, that the variance was not material.

The rule above laid down with respect to contracts applies equally to the case of a prescription: a prescriptive right is one entire thing, and, when put in issue, must be proved as stated. It ought to be proved, therefore, to the full extent, to which it is claimed. Thus, in replevin, if the defendant avow taking cattle as damage feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not be sufficient, for the issue is upon the whole. (3) But though the party must prove a prescriptive right, at least, commensurate with the right claimed, he will not be precluded from recovering, because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep. (4)

Variance in
prescription.

Proof of more
ample right.

(1) *Miles v. Sheward*, 8 East, 7. *Cotterill v. Cuff*, 4 Taunt. 285. *Squier v. Hunt*, 3 Price, 68. *Handford v. Palmer*, 2 Brod. & Bing. 359. See *Blyth v. Bampton*, 3 Bing. 472.

(2) 13 East, 410. *Crispin v. Williamson*, 8 Taunt. 107.

(3) *Sloper v. Allen*, 2 Roll. Ab. 706, tit. Trial, c. 41, S. C. cited

Bull. N. P. 299. *Gray's case*, 6 Rep. 79. *Down's case*, 4 Rep. 29, b. *Rogers v. Allen*, 1 Campb. 313. See *Brook v. Willett*, 2 H. Black. 224.

(4) *Bushwood v. Bond*, Cro. El. 722. *Bailiff, &c. of Tewkesbury v. Bricknell*, 1 Taunt. 142. *West v. Andrews*, 6 Barn. & Ald. 77.

Plea in bar.

Action for disturbance.

A distinction is to be made between the case of a prescriptive right of common alleged in bar, on which issue is taken, and a possessory right of common claimed in an action of tort for disturbance of the right. In the latter case, it is sufficient to prove the same ground of action as is laid in the declaration, although not to the extent there stated. If the allegation is, that the plaintiff was entitled to the right of common in respect of a certain quantity of land, and the proof is in respect of a part only of that land, it will be sufficient; (1) so if it is claimed in respect of a messuage and a certain number of acres of land, and proved to be in respect only of land. (2) The proof, in these cases, is not of a different allegation, but of the same allegation in part; and that is sufficient. (3)

Variance in proof of deed.

Description.

Where a deed is declared upon, and it appears, on comparing and reading the record with the instrument produced, that some of the words, stated in the pleadings as descriptive of the deed, (and which cannot be rejected as surplusage,) vary from the deed, this is a variance; (4) and though some parts of the deed, which the declaration purports to set out at length, need not have been stated at all, or might have been stated shortly, according to their legal effect and operation, (5) yet, if they are set out at length and descriptive of the deed, they ought to be proved as laid. A qualified covenant ought to be stated with all its qualifications; if it is set out in the declaration as a general covenant, and, on reading the deed in

(1) *Eardley v. Turnock*, Cro. Jac. 629. *Palmer*, 269, S. C. 2 Barn. & Ald. 366.

(2) *Ricketts v. Salwey*, 2 Barn. & Ald. 360. *Manifold v. Pennington*, 4 Barn. & Cress. 161.

(3) 2 Barn. & Ald. 366.

(4) The following are the principal modern cases on this subject: *Sands v. Ledger*, 2 Lord Raym. 792. *Pitt v. Green*, 9 East, 188. *Bowditch v. Mawley*, 1 Campb. 195. *Howell v. Richards*, 11 East, 633. *Waugh v. Russell*, 5 Taunt. 707. *Tempany v. Bernard*, 4

Campb. 20. *Morgan v. Edwards*, 2 Marshall, 96. *Hoar v. Mill*, 4 Maule & Selw. 470. *Weeks v. Maillardet*, 14 East, 568. *Gordon v. Gordon*, 1 Starkie, N. P. C. 294. *Horsefall v. Testar*, 7 Taunt. 385. *Cartridge v. Griffiths*, 1 Barn. & Ald. 57. *Swallow v. Beaumont*, 2 Barn. & Ald. 765. *Brown v. Knill*, 2 Brod. & Bing. 395. *Arnold v. Revoult*, 1 Brod. & Bing. 443.

(5) *Dundas v. Lord Weymouth*, Cowp. 665. *Price v. Fletcher*, Cowp. 727. *Roulston v. Clarke*, 2 H. Bl. 663.

evidence, it appears to be subject to an exception or limitation, this ^{is} a variance. (1)

If the declaration does not profess to describe a deed or to set it out according to its tenor, but states it correctly in substance and in its legal effect, a variance will be immaterial. In an action against a tenant for breach of covenant, proof of a lease from the plaintiff and his wife to the defendant will support an averment of a lease from the plaintiff alone, at least, where the wife had only a chattel interest in the lands before marriage, or where they are the property of the husband; for the covenants made to husband and wife may, in legal effect, be deemed covenants made to the husband alone. (2) So bonds and promissory notes, given to the wife, may be declared upon, as having been given to the husband, in a suit by him. (3)

Deed stated in substance.

A similar rule has been laid down, where a record is referred to in the pleadings. Whatever may have been the rule upon this subject in ancient times, a distinction is now established between allegations of matter of substance, and allegations of matter of description. The former require to be substantially proved: the latter must be literally proved. (4)

Variance in proof of record.

If the allegation is descriptive of the record, it ought to be strictly and literally proved, as laid. Thus, in the case of *Green v. Rennett*, (5) where a writ was described in terms, when sued out and when returnable, and on the production of the writ itself, it appeared to be returnable on a different day from that stated in the declaration, the Court held that the

Allegations of descriptions.

(1) *Howell v. Richards*, 11 East, 633. *Tempany v. Bernard*, 4 Campb. 20.

(2) *Arnold v. Rivoult*, 1 Brod. & Bing. 442. *Beaver v. Lane*, 2 Mod. 217, S. P.

(3) 1 B. & B. 442. *Ankerstein v. Clarke*, 4 T. R. 616. In this case the bond was given to the husband and wife as administratrix.

(4) By *Abbott, C. J.*, 3 Barn. & Cress. 4.

(5) 1 T. R. 656. 9 East, 161, 163. *Brown v. Jacobs*, 2 Esp. N. P. C. 726. *Rex v. Taylor*, 1 Campb. 404. See also Com. Dig. tit. Record, (C). (D). *Rex v. Leefe*, 2 Campb. 141. *Woodford v. Ashley*, 2 Campb. 193. *Rex v. Bellamy*, 1 Ry. & Mo. 171. *Sheldon v. Whitaker*, 1 Ry. & Mo. 266. *Bevan v. Jones*, 4 Barn. & Cress. 403. *Edwards v. Lucas*, 5 Barn. & Cress. 339.

variance was fatal, though the day of the return was laid under a *videlicet*.* In this case the return-day was material, because it was part of the description of the writ stated, which could only be proved by a writ returnable on the same day.

Allegations of substance.

Where the pleadings do not undertake to set out the tenor of a record, but the substance only of it is stated, it is sufficient if the allegation is substantially proved. Thus in the case of the *King v. Lookup*, on a prosecution for perjury, where the objection was, that the indictment stated a bill in Chancery to be directed to Robert Lord Henley, &c., and it appeared in evidence to have been directed to Sir Robert Henley, Knight, &c., the Court over-ruled the objection, and held it to be sufficient, that the complainant had preferred a bill before the person who held the great seal, by whichever title he was styled. (1)

Direction of bill.

Date of acquittal.

So in the case of *Purcell v. Macnamara*, (2) in an action for a malicious prosecution, where the allegation was, that the defendant prosecuted an indictment against the plaintiff, until

(1) *Rex v. Lookup*, cit. 1 T. R. 240. 9 East, 163. *Rex v. Pippet*, 1 T. R. 235. *Rex v. Payne*, cit. 9 East, 158. *Rex v. Leefe*, 2 Campb. 139. *Byne v. Moore*, 5 Taunt.

187. *Cousins v. Brown*, 1 Ry. & Mo. 291.

(2) 9 East, 157. *Philips v. Bacon*, 9 East, 298. *Philips v. Shaw*, 4 Barn. & Ald. 435.

Effect of *videlicet*.

* Where the circumstance averred in the pleadings (as, of a particular sum or day,) is material, the addition of a *videlicet* will not render the averment immaterial, (*Grimwood v. Barrit*, 6 T. R. 460, 463;) though the omission of a *videlicet* may in some cases make an averment material, which, if a *videlicet* had been inserted, would not have been so. (*Symmons v. Knox*, 3 T. R. 65, 68. *Crispin v. Williamson*, 8 Taunt. 112.) If therefore the day, laid in the declaration, be material, it must be proved, notwithstanding that it is laid under a *videlicet*. It is by no means generally true, that the omission of a *videlicet* will make it necessary to prove the particular sum or day, &c. strictly as laid. Some cases have been already mentioned, where a variance in the proof of such circumstances has been adjudged to be immaterial. It will be sufficient to add one other example. On an indictment for stealing goods in a dwelling-house, under the statute 12 Ann. st. 1, c. 7, it is not necessary to prove, that the goods were of greater value than 40s., though that should be averred in the indictment without a *videlicet*. And see *Rex v. Burdett*, 1 Lord Raym. 149. *Rex v. Gilham*, 6 T. R. 265. *Gwinnett v. Phillips*, 3 T. R. 643, and 2 Campb. 231.

afterwards, to wit, on a certain day named, the plaintiff was in due manner acquitted, &c.; and, to prove this allegation, the record of acquittal was produced, which showed that the acquittal was on another day, the Court held that the variance was not material, and that the averment had been substantially proved. Here the day was not alleged as part of the description of the record; but the substance of the allegation was, that the plaintiff had been acquitted on the prosecution.

In the case of the *King* against *Bellamy*, (1) which was an indictment for perjury, the indictment, in setting out the record of the case at the trial, at which the perjury was alleged to have been committed, stated an adjournment of the sessions "by Const, Esq., and B., C., and D., and others their fellows, justices," &c. The examined copy of the record stated the adjournment to have been made by "Const, Esq., and E., F., G., and others their fellows." Lord Tenterden held, that evidence was admissible, to shew that the justices named in the indictment were present. No such evidence having been given, the defendant was acquitted.

Names of
justices pre-
sent.

So in an action against a sheriff for a false return, where the declaration stated, that the plaintiff in a certain term, (naming the term and the year) by judgment recovered, "as appears by the record," and the proof was that he recovered by a judgment of another term and a different year, the Court held that this was not a variance; that the averment, "as appears by the record," was mere surplusage, and might be rejected, inasmuch as the judgment was not the foundation of the action, but only inducement to it. (2)

Date of judg-
ment.

It is a rule in pleading, that every material fact which is issuable and triable, must be averred to have happened at a certain time. (3) However, it will not generally be necessary to prove the time precisely as laid, unless that particular time is

Variance in
time.

(1) Ry. & Mo. 171.

(2) *Stoddart v. Palmer*, 3 Barn. & Cress. 2. In this case, an opi-

nion of Lord Ellenborough in *Purcell v. Macnamara* was overruled.

(3) 5 T. R. 620.

Indictment.

material. This is the constant course of proceeding in criminal prosecutions, from the highest offence to the lowest. In high treason, evidence may be given of an overt act either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. Objections of this kind, on behalf of the prisoner, have been repeatedly overruled. (1)

Action.

The same general rule applies, with as much reason, to civil suits. Thus, in an action on a promissory note, where the declaration states that the defendant on such a day made, &c., proof that he made his promissory note on a different day would be sufficient. So in an action for assault, battery, taking of goods, &c., where the defendant pleads the general issue, the plaintiff will not be confined to the day stated in the declaration, but may prove the assault, &c., on any other day before the commencement of the action. (2) If the defendant justifies by *son assault* on the same day, and the plaintiff traverses the cause of justification, and at the trial the defendant proves the trespass on the same day, there the plaintiff cannot give evidence of an assault on another day. (3) And though the defendant should prove the assault of the plaintiff on another day, yet the plaintiff, after having made such a traverse, cannot prove another assault on a different day; (4) for by the traverse he admits, that the trespass named in the plea is the same with that in the declaration. (5)

*Son assault
demesne.*

Variance in
place.

The same certainty of description, as to the place or parish, is not so necessary in transitory as in local actions. In an action for non-residence, where the parish was described as *St. Ethelburg*, and proved to be *St. Ethelburga*, it has been held, that the variance was fatal; (6) so also it was, in an action of

Material.

(1) Lord Balmarino's case, Lord Kilmarnock's case, Townley's case, State Trials. Post. 8.

(2) Co. Lit. 282, a. b. 2 Roll. Ab. 687, 689, tit. Verdict, (N). Com. Dig. tit. Pleader, (S. 12).

(3) Downes v. Skrymsher, Brownl. 233. 2 Roll. Ab. 687, l. 30, S. C.

(4) 2 Roll. Ab. 680, tit. Evidence, (C.) Art. 3. Thornton v. Lyster, Cro. Car. 514, *contra*, (Jones, J., doubting,) Roll. Ab. *ib.* See 2 Saund. 5, note 3.

(5) 2 Wms. Saund. 5.

(6) Wilson q. t. v. Gilbert, 2 Bos. & Pull. 281.

ejectment, where the premises were described as situate in the united parishes of *A. and B.*, but were proved to be in the parish of *A.*, and the two parishes were united only for the single purpose of maintaining the poor. (1) Where the premises were described as being in the parish of *St. George the Martyr, Bloomsbury*, and were proved to be in the parish of *St. George, Bloomsbury*, the variance was held to be fatal. (2)

But where the premises were described as lying in the parish of *A. and B.*, and it appeared in evidence that part lay in *A.*, and part in *B.*, and that there was no such parish as *the parish of A. and B.*, the Court held, that the word *parish* was mere surplusage, and that the plaintiff was entitled to recover the lands in *B.* as well as in *A.* (3) So where the premises were laid to be in the parish of *Farnham*, and were proved to be in the parish of *Farnham Royal*, but it did not appear that there were two *Farnhams*, the Court held that the variance was immaterial. (4) But if there had appeared to be another *Farnham*, there would have been an uncertainty. (5)

In an action for use and occupation, where the premises were proved to lie in the parish of *St. Mary, Lambeth*, but were described in the declaration as in the parish of *Lambeth*, which last was the name generally known, the variance was held to be immaterial: (6) and this has over-ruled an older case, where a variance between the parish of *Chelsea*, and the parish of *St. Luke's, Chelsea*, was held at *nisi prius* to be fatal. (7) Although it is not necessary, in this action, to describe where the premises lie, (8) yet if they are described in

(1) *Goodtitle dem. Pinsent v. Lammiman*, 2 Campb. 274.

(2) *Harris v. Cooke*, 8 Taunt. 339.

(3) *Goodtitle dem. Bremridge v. Walter*, 4 Taunt. 671. See *Sir C. Morgan v. Edwards*, 6 Taunt. 394. The case of *Wilson v. Clerk*, therefore, (1 Esp. N. P. C. 273,) seems doubtful.

(4) *Doe dem. Tollet v. Salter*, 13 East, 9. *Rex v. Glossop*, 4 Barn. & Ald. 619. *Taylor v. Hooman*, 1 Moore, C. P. 161.

(5) *Taylor v. Hooman*, Holt, N. P. C. 523.

(6) *Kirtland v. Pounsett*, 1 Taunt. 570.

(7) And see 3 Taunt. 140.

(8) *King v. Fraser*, 6 East, 348.

the declaration as situate in a certain parish, and are proved to be in a different parish, there is a variance. (1)

Matter of venue.

Where the parish or place mentioned is mere matter of venue, and not of local description, (as, in an action for a nuisance defamatory to the plaintiff's character, where the declaration stated, that the defendant erected the nuisance complained of, in *the parish of A.*, in a street adjoining to the plaintiff's house, &c.) the actual situation of the house is immaterial, and the plaintiff may recover, though it should be proved that there is no such parish. (2)

Rule in indictments.

On the trial of an indictment, it will be sufficient to show, that the offence was committed in some place within the county or other division. Mr. Serjt. Hawkins says, (3) it seems to be agreed, that the mistake of the place, in which an offence is laid, will not be material upon the evidence, on the plea of not guilty, if the fact be proved at some other place in the same county. Even if there should appear to be no such parish, as that laid, in the county, it has been doubted whether the indictment would be bad. (4)

Amendment at the trial of variances.

Formerly, at the trial of the cause, a material variance, between the allegation in the pleading and the state of facts proved, was a fatal objection, and decided the suit in favour of the objecting party; and a variance was often considered in this technical sense as material, though to common sense it might appear to be very trifling, and though it might have been wholly irrelevant to the merits of the case. (5) The

(1) *Guest v. Caumont*, 3 Campb. 235. 6 East, 352.

(2) *Jefferies v. Duncombe*, 11 East, 226. 2 Campb. 3, S. C. For other examples, see *Drewry v. Twiss*, 4 Term Rep. 558. *Frith v. Gray*, *ib.* 561. *Comp. of Mersey & Irwell Nav. v. Douglas*, 2 East, 497. *Hamer v. Raymond*, 5 Taunt. 789.

(3) B. 2, ch. 25, s. 84. *Rex v.*

Dowling, 1 Ry. & Mo. 433.

(4) *Rex v. Dowling*, 1 Ry. & Mo. 433. And see 3 Campb. 73. But see also 9 H. 5, st. 1, c. 1, and Burn's Just. 24th ed. p. 56, MS. case.

(5) See the second report of the Commissioners on Courts of Common Law, p. 35, and see the cases of *Walters v. Mace*, *ante*, 852, and *Jones v. Cowley*, *ante*, 855.

pleader endeavoured to guard against such perils by the multiplication of counts, and pleas, alleging the facts, with variations. The numerous cases on this subject shew that this precaution was far from completely successful, in avoiding the fatal effect of a variance. In an action on a written instrument, indeed, the language of the instrument may always be used, and the Court will put a construction on it; (1) and Lord Tenterden's act, (2) by giving the judge at *nisi prius* a power to amend statements in the pleading of written instruments, afforded in a slight degree a remedy for the mischief.

Amendment at
nisi prius.

That statute reciting "that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variance between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and that such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time," for remedy thereof, enacts, "that it shall and may be lawful for every Court of Record holding plea in civil actions, any Judge sitting at *nisi prius*, and any Court of Oyer and Terminer, and General Gaol Delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the Court, on payment of such costs (if any) to the other party, as such Judge or Court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared, and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the postea and returned together

Lord Tenterden's act.

(1) See an instance in *Price v. Williams*, 1 M. & W. 6.

(2) 9 G. 4, c. 15.

Amendment at nisi prius. with the record, and thereupon the papers, rolls, and other records of the Court from which such record issued, shall be amended accordingly.

Under this statute, it has been held, that in setting out a record of a judgment, a mis-statement as to the Court, in which it was obtained, may be amended; (1) and that a mistake in the date of a bill of exchange, (2) or misdescription of a promissory note as a bill of exchange, may be rectified. (3) In an action for not obeying a subpoena, (4) the Court of Common Pleas held, that a declaration ought to be amended, by inserting, instead of "a copy of a writ of subpoena," "a copy of so much of the writ of subpoena as related to the defendant;" and on the authority of this case, the Court of King's Bench held, that a statement of a contract might be made conformable to the written contract produced at the trial, as to the time for the performance of it, though it did not appear in the declaration whether the contract was written or oral. (5) The latter case appears to overrule an earlier decision of Mr. Justice Park, at Nisi Prius, that a variance between the statement in an awowry of the terms of a tenancy, and the proof produced in support of it, was not within the statute, on the ground, that the statute applied only to cases in which some particular written instrument is professed to be set out, or recited, in the pleadings. (6) The Court of Exchequer have held, that this statute does not apply to a variance between the statement of a writing in the pleadings, and the secondary evidence of the writing. (7) In one case, Lord Tenterden refused to amend the declaration, when the mistake arose from want of common care in drawing it. (8)

In the case of contracts, of which written instruments are

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| (1) Briant v. Eicke, M. & M. 359. | Bing. 480. |
| (2) Bentzing v. Scott, 4 C. & P. 24. | (5) Lamey v. Bishop, 4 B. & Ad. 479. |
| Parks v. Edge, 1 C. & M. 429. | (6) Ryder v. Malbon, 3 C. & P. 594. |
| (3) Moilliet v. Powell, 6 C. & P. 283. | (7) Brooks v. Blanshard, 1 C. & M. 779. |
| (4) Masterman v. Judson, 8 | (8) Jelf v. Oriel, 4 C. & P. 22. |

evidence only, and in cases founded on oral evidence, it was never possible to know with certainty the construction that would be put on the evidence, or the variations that might be expected from inadvertence and failure of memory in witnesses. This was a serious inconvenience, and required a relaxation of the strictness of law as to variances; and when the rule of pleading was reformed by a prohibition of more than one count or plea for each cause of action or defence, it became absolutely necessary to guard against it, by giving a very large power of amendment to the Judge at *nisi prius*. With this, among other objects, the stat. 3 & 4 W. 4, c. 42, was passed, the 23d section of which,—after reciting, “that whereas great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of vacancies (1) as to some particular or particulars between the proof and the record or setting forth, on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record, and whereas it is expedient to allow amendments to be made on the trial of the cause,”—enacts, “that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at *nisi prius*, (2) if such Court or Judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such Court or Judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars

Amendment at
nisi prius.

Judge at *nisi prius* may amend the record in certain cases.

(1) *Sic*.

(2) The sheriff presiding on a writ of trial, seems to be a judge

within the meaning of this section.
Hill v. Salt, 2 Cr. & M. 421.

Amendment at
nisi prius.

Terms of
amendment.

in the judgment of such Court or Judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings, which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such Court or Judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such Court or Judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such Court or Judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such Court or Judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at *nisi prius* or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the Court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any Court of Record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such Judge at *nisi prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the Court from which such record or writ issued for a new trial upon that ground, and in case any such Court shall think such amendment improper, a new trial shall be granted accordingly, on

such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet." Amendment at nisi prius.

Another section relieves the Judge from the responsibility of directing the amendment in doubtful cases, and enables him to refer to the Court the question of the effect of the discrepancy between the proof and the pleading. The 24th enacts, "That the said Court or Judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said Court or the Court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case." Judge may refer to the Court the facts.

Power for the court or judge to direct the facts to be found specially.

In considering the latitude of amendment that may be permitted under the last mentioned statute, it must be borne in mind, that one of the reasons for giving the power of amendment is, that the party, in whose favour it is to be exercised, is now deprived of the means, which he formerly had, of avoiding a variance, by making different statements of his cause of action, or of his ground of defence. The prohibitory rules, framed by the judges under the authority of this statute, recite that, "the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the cause, are greatly enlarged." These rules prohibit several counts and pleas, when the statements therein differ in so small a degree, as to shew that they are merely alternative statements of the same cause of action or defence; but cases are not within the rules, when the descriptions do not so approximate, though it should appear that in point of fact there is but one cause of action or defence. (1)

(1) See *Jenkins v. Treloar*, 1 M. & W. 16, and the examples given in the rules, particularly the example of a case which may be per-

Amendment at
nisi prius.

Therefore, it seems, that the rules and authorities, shewing what counts and pleas cannot be permitted to stand together, offer at least some indication as to the cases in which an amendment from one statement to the other would be permitted. In the case of *Jenkins v. Treloar*, (1) Parke, B., in giving judgment, that two counts, of which one was assumpsit for a toll claimed as metage, and the second was for toll claimed as port duty, could not be allowed, intimated that he should be disposed to allow an amendment at the trial, if necessary, (2) by substituting one count for the other.

Power of
amending to be
exercised
liberally.

In *Hanbury v. Ella*, (3) (a case of an alteration of a statement of a promise to pay, to a promise to guarantee,) Parke, J. said, "I may observe, that if such amendments were not permitted, there would be an end of the benefit of the new rules for pleading, laid down by the Judges, which proceed upon the assumption that, by the said act of the 3 & 4 W. 4, c. 42, s. 23, the powers of amendment at the trial in cases of variance, in particulars not material to the merits of the cause, are greatly enlarged." And in *Parry v. Fairhurst*, (4) Alderson, B., said, "we should do great injustice, parties being bound down to one count or one plea, as they at present are, unless we were liberal in amending the variances."

Nature of ac-
tion immaterial.

For the same reason it should seem, the nature of the action or defence ought not to make any difference in the exercise of the power of amendment; in every instance in which the prohibitory rules apply, the power which accompanies the

ted, "a count for freight upon a charter party, and for freight *pro rata itineris* upon a contract implied by law." So, "in trespass, *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement are to be allowed."

(1) 1 M. & W. 16.

(2) According to the recollection and note of the editor, in the case

of *Jenkins v. Treloar*, the learned Judge said, "The prohibition of several counts, and the power of amendment, though not exactly, are almost correlative." See also in support of this view, the judgment of the same learned Judge in *Hanbury v. Ella*, 1 Ad. & Ell. 64.

(3) 1 Ad. & Ell. 61.

(4) 2 C. M. & R. 196.

prohibition ought to apply also. In a case (1) that occurred soon after the passing of the statute, Parke, B., amended the description of the parish in an action of ejectment for a forfeiture. It was objected, that the action was a harsh and oppressive proceeding, but the learned Judge said, "I do not think that the supposed impropriety of the action is a consideration that ought to influence me, in deciding whether I shall give leave to amend under the act of parliament." Amendment at nisi prius.

In the case of *Hemming v. Parry*, (2) the declaration in an action for a breach of a warranty of a horse stated a general warranty: the defendant pleaded non assumpsit. Upon the proof it appeared, that the warranty was "sound except in one foot." The breach of warranty, complained of, consisted in an unsoundness of the wind. Alderson, B., amended the declaration, observing, that if the defence had depended in any way upon the qualification of the warranty, he would not have allowed it, as that would have gone to the merits. So also in the case of *Mash v. Denham*, (3) which was an action on the case for a false representation of the soundness of a horse, and the plea was not guilty, Alderson, B., amended the declaration, by substituting, for an allegation that the defendant represented the horse to be sound and a good worker, an allegation that the defendant represented the horse to be sound in the wind. Hemming v. Parry.
Mash v. Denham.

In *Hanbury v. Ella*, (4) the Court of King's Bench recognized the propriety of an amendment made at *nisi prius*, by which a statement in the declaration, of a contract to pay for certain goods to be delivered, was altered to a statement of a contract to guarantee payment for them. In the case of *Parry v. Fairhurst and others*, (5) an action on the case was brought against the defendants as carriers for negligence in conveying the plaintiff's goods: the defendants pleaded "not guilty:" and upon the evidence it appeared, that the defendants, if Hanbury v. Ella.
Parry v. Fairhurst.

(1) *Doe d. Marriott v. Edwards*,
1 M. & Rob. 321. 6 C. & P. 208,
S. C.

(2) 6 C. & P. 580.

(3) 1 M. & R. 443.

(4) 1 Ad. & El. 61.

(5) 2 Cr. M. & R. 190.

Amendment at
nisi prius.

liable at all, were liable only as wharfingers. No application was made for an amendment until after the defendant's case was closed, and the plaintiff's counsel was about to reply. The learned Judge refused to amend, but left to the jury the question of the liability of the defendants as wharfingers. The jury finding this question in favour of the plaintiff, the Judge directed the verdict on the unamended issue to be entered for the defendant, and the special finding of the jury to be indorsed on the record, in order that, if the Court should be of opinion, that the amendment ought to have been allowed, the declaration might be altered by stating the contract to be to forward. There were special circumstances in the case, shewing that the defendant might have been prejudiced in the conduct of his defence. The Court made the rule absolute for a new trial on payment of costs, Parke, B., observing, that under the circumstances, he should have exercised the power of amendment given by the statute, postponing the trial to another day to enable the defendants to shew the fact (notice of limited liability), which might have exonerated them altogether. Alderson, B., dissented from the judgment, but only on the ground, that the amount in dispute was under 20*l.*, and therefore the case fell within the spirit of the rule prohibiting the granting of a new trial upon a verdict against evidence where the amount is under 20*l.*, and that the application for an amendment was made too late in the cause. In this case there was also the material circumstance, that the declaration was before the new rules of pleading; Mr. Baron Parke said, the plaintiff was not so much entitled to this amendment as he would have been, had the declaration been subsequent. In *Howell v. Thomas*, (1) an action of trespass, in which issue was joined on the plaintiff's property in a close called in the declaration "Clover Hill," Coleridge, J., altered the name to "Clover Moor."

Howell v.
Thomas.

Ivey v. Young.

In *Ivey v. Young*, (2) the variance was between a contract for certain poles to be paid for on delivery, and a contract to pay

(1) 1 M. & R. 342.

(2) 1 M. & R. 546.

cash on delivery, with five per cent. discount. It further appeared that part had been delivered. An application to amend was opposed on the ground, that if the contract had been stated properly, the defendant might have been prepared to shew, that he rescinded the contract, on the plaintiff's refusal to pay on the first delivery. Alderson, B., allowed the cause to proceed, and nothing being elicited to shew that the defendant rescinded the contract on that ground, the learned Judge made the amendment, and the plaintiff had a verdict.

Amendment at nisi prius.

In the case of *Doe d. Poole v. Errington*, (1) the demise was joint by two lessors of the plaintiff; it appeared that they claimed as tenants in common: an application was made to amend "by striking out the name of one of the lessors of the plaintiff, or adding proper words applicable to the title as it appeared." Taunton, J., refused the application, ruling that "the amendment was prayed for in a particular way very material to the merits of the case."

Amendments refused.
Doe v. Errington.

This statute, it seems, gives no power to supply a material omission in a plea. In *John v. Currie*, (2) in an action of trespass for taking mirrors and handkerchiefs, Parke, B. refused to amend a plea, which justified the taking of the mirrors, by extending the justification to the handkerchiefs also. This statute gives no authority to amend the award on the record of process, (3) to strike out the name of a defendant, (4) nor to increase the amount of damages laid in the declaration. (5)

Supplying material omissions.

In the case of *Frankum v. The Earl of Falmouth*, (6) the plaintiff complained of an injury sustained by the diversion of a watercourse, the right to which he claimed in respect of a mill: the defendant traversed the right to the watercourse. At the trial before Alderson, B., it appeared that the mill was

Cases of special finding.
Frankum v. Earl of Falmouth.

(1) 1 Ad. & E. 750.

(2) 6 C. & P. 618. See Pullen v. Seymour, *infra*, 875, as to supplying omissions in a description.

(3) Adams v. Power, 7 C. & P. 76.

(4) Cooper v. Whitehead, 11 C. & P. 545.

(5) Watkins v. Morgan, *ib.* 661.

A variance in the statement of the penalty of a bond, and the bond proved may be amended. Hill v. Street, 2 C. & M. 420.

(6) 6 C. & P. 529. 2 Ad. & E.

Amendment at
nisi prius.

of modern erection, and that therefore the plaintiff's claim to the water was not in respect of the mill, but *ex jure nature*, in right of the stream running to his land, and of an antecedent appropriation of the water by the plaintiff by the erection of the mill. An application to amend the declaration was refused, but the learned Judge directed a special finding under the 24th section, that the defendant had diverted the water from its accustomed and proper course to the plaintiff's premises, as they existed before the mill was erected. The verdict was entered for the defendant on the issue. On a motion to give judgment for the plaintiff, according to the right and justice of the case, the Court refused the rule as prayed for, saying, that the variance was material, and that the defendant might have prepared his defence to meet the claim made in respect of the mill, and not of the land. (1) In *Guest v. Elwes*, (2) an action was brought against the sheriff for an escape. At the trial, the proof, upon an issue joined on a plea of not guilty, was that the defendant negligently omitted to arrest. Alderson, B., directed the facts to be found specially, and the Court of King's Bench, in delivering the judgment of the Court for the plaintiff, said, "After conference with the learned Judge, and indeed upon the argument at the bar, we are fully convinced, that in this case the defendant experienced no disadvantage whatever from the course adopted, and that on the other hand the plaintiff, who had suffered from some breach of duty on the part of the sheriff, and who most probably was without the means of discovering precisely what it was, might have been really injured by too strict an adherence to the issue actually joined." Lord Denman further said, the Court had no power, whatever the Judge at *nisi prius* might have, to impose terms "on the successful party, whose mistake has been corrected, and whose right, if claimed, as it has been proved, might possibly never have been disputed by the defendant."

Review of
Judge's decision.

It seems that the Judge's discretion in making amendments under Lord Tenterden's act cannot be reviewed (3) by the

(1) 2 Ad. & El. 455.
(2) 5 Ad. & El. 118.

(3) Parke v. Edge, 1 C. & M.
429.

Court, and in *Doe d. Poole v. Errington*, (1) the same doctrine seems to have been held by Lord Denman, with respect to a review of the Judge's discretion in refusing amendments under the later and more extensive statute. The Court of Exchequer, however, appears to have considered, that in the latter case the Judge's decision may be reviewed. In one case, (2) that Court is reported to have set aside a nonsuit, and granted a new trial on payment of costs, where the Judge at *nisi prius* had refused to amend a count on a bill of exchange, by inserting the words "three months after the date thereof," in the description of the bill; the argument appears to have been urged, that the Judge's decision is final. By the express words of the statute, a party dissatisfied with the allowance of an amendment, may apply to the Court for a new trial, on the ground that it ought not to have been permitted.

Amendment at
nisi prius.

Review of
judge's deci-
sion.

SECTION IV.

Of Particulars of Demand.

It was observed, in a former part of this work, that an inquiry into the question of the facts, which are put in issue on the record, belongs rather to a treatise on pleading than to a treatise on evidence. Independently, however, of the issues joined on the record, a practice has grown up of requiring, in cases where the pleadings, in consequence of their generality, give little information of the case to be adduced, written particulars of the causes of action which are relied on by a plaintiff, and of the cross claims which the defendant seeks to make the subject of a set-off. By these written particulars the parties are bound. It is not intended to discuss the cases in which the parties may be compelled to give particulars, but only the effect of them upon the evidence offered at the trial.

(1) 1 Ad. & El. 750.

(2) Pullen v. Seymour, 5 Dowl. 164.

Not incorporated in the pleadings.

but are binding on the party giving them.

It has been frequently said, that particulars are to be considered as incorporated in the pleadings, that, however, is not strictly correct, they are binding upon the party who gives them, and intended for the benefit and information of the other party, who is not obliged to look out of the record. (1) Therefore, it seems, a plea in excuse, or in confession and avoidance, is not an admission of the particulars. It has been held, that a plea of payment of money into Court does not admit a liability on all the contracts stated in the particulars. (2) The party giving the particulars is bound by them, not with the same degree of technical strictness as in pleading; but he is not permitted to go into a cause of action or set-off, substantially different from that described in them. Therefore, where the particular of the plaintiff's demand was a promissory note only, evidence of which was excluded at the trial on the ground of the insufficiency of the stamp, Lord Kenyon ruled, that the plaintiff could not, on the other counts of the declaration, go into the consideration of the note, observing, "The particular is to apprise the opposite party of what he is to come prepared to try; and the plaintiff who gives it, must be bound by it, or particulars are of no use. I would assist the defendant if I could, but the defendant having come prepared to meet one demand, must not be called upon to meet another." So, where the declaration contained counts on three several bills of exchange, but in the particulars the plaintiff claimed in respect of the first of them only, it was held, that the plaintiff clearly could not recover on the other two, though they were admissible in evidence on a collateral inquiry, whether two of the defendants had ceased to be partners at the time when the bill, in respect of which they were sought to be charged, was given. (3) Where the particular of demand was, "To a beast sold and delivered, 13*l.* 10*s.*," it was held, that the plaintiff could not recover upon proof that the defendant had said to a third person, "that he owed the plaintiff 13*l.* 10*s.* and was afraid he was going to put him to trouble:" the defendant did not say what the sum

(1) *Booth v. Howard*, 5 Dowl. 441.

(2) *Ibid.*

(3) *Duncan v. Hill*, 2 B. & B. 682.

was owing for. (1) Under a particular for horses sold and delivered by the plaintiff to the defendant, it has been held, that the plaintiff cannot recover money had and received by the defendant, for horses sold by him as agent to the plaintiff. (2) So where, in an action brought for money had and received against a stakeholder, the particulars of demand were for 11*l.* deposited by the plaintiff, and for 2*l.* deposited by another person, in the hands of the defendant as a stakeholder, and won of that person by the plaintiff, it was held, that the plaintiff could not recover his own stake upon a demand of it before it was paid over; for, said Lord Abinger, "the defendant might have a host of witnesses to prove that the plaintiff did not win the wager; then the latter comes into Court with a case entirely different,—that he demanded back his money before the wager was decided." (3)

Precision of
particulars.

If the particular convey the requisite information, however inaccurately it may be drawn up, it is sufficient. (4) In an action of assumpsit for money paid to the use of the defendant, three several sums were mentioned in the particulars, as follow :

" To cash paid Froggat and Co.	-	-	£80	13	0
To ditto paid Hoffman and Co.	-	-	93	8	0
To ditto ditto	-	-	80	13	0

The facts were, that the third as well as the first item was paid to Froggat and Co., and upon the plaintiff's counsel offering to shew, that this insertion, of the item for cash paid Hoffman and Co. between the other two, was a clerical error, Lord Ellenborough overruled an objection, that under those particulars the plaintiff could not give evidence of two sums of 80*l.* 13*s.* paid to Froggat and Co. So an error in the date as

(1) *Breckon v. Smith*, 1 Ad. & El. 488. It should rather seem that the insufficiency of the evidence on any count, was the ground of the decision, and not the inappropriateness of the particular. It was held, that there was no evidence of an account stated,

as the admission was not made to the plaintiff.

(2) *Holland v. Hopkins*, 2 B. & P. 243. *Rex acc. Macarthy v. Smith*, 8 Bing. 145.

(3) *Davenport v. Davies*, 1 M. & W. 570.

(4) *Day v. Bower*, 1 Campb. n.

Precision of particulars.

to the month, in which the particulars stated work to be done for the defendant, is not material ; it not appearing that work had been done at two distinct periods. (1)

In debt for rent, a wrong description of the parish in which the premises are situated, is not material. (2) In an action for goods sold and delivered, and for money paid, the particulars were: "To seventeen firkins of butter, 55*l.* 6*s.*" it was held, that the plaintiff might recover the value of seventeen firkins entrusted by him to a carman, who, by mistake, had delivered them to the defendant, and which the defendant had afterwards sold. Mansfield, C. J., said, "bills of particulars are not to be construed with all the strictness of declarations; this bill of particulars has no reference to any counts, and it sufficiently expresses to the defendant that the plaintiff's claim arises on account of the butter."

In the case of *Harrison v. Wood*, (3) it was held, that the term "advances" ought not to be narrowed, so as to exclude disbursements for expenses incurred by the plaintiff, when acting as a travelling clerk to the defendant, and that under a claim for such advances, made between the 20th March and the 1st April, the plaintiff might recover for advances made up to the 1st September; there being nothing to shew that the mistake in the date, in putting April for September, could have misled the defendant.

Non-delivery of particulars of set-off.

An order for delivery of particulars of the plaintiff's demand, is enforced by staying the proceedings until it is obeyed, but the usual mode of enforcing an order of particulars of a set-off is, by preventing the defendant giving any evidence in support of a plea, unless he have given the particulars. If the defendant have not complied with the order, the plaintiff should be prepared to prove it at the trial, as the non-delivery of par-

(1) *Milwood v. Walter*, 2 Taunt. 224.

(2) *Davies v. Edwards*, 3 M. & S. 380.

(3) 8 Bing. 371. Other cases to the same effect are *Lambirth v. Roff*, 8 Bing. 411. *Green v. Clark*, 2 Dowl. 18.

particulars is not in itself sufficient to exclude the evidence, unless such an order has been made. In a case, (1) where an order had been made for the delivery of particulars of set-off with dates, Tindal, C. J., excluded evidence of a set-off, the only particulars delivered being, for work and labour, &c., "from January 1828 to January 1834."

Particulars of set-off.

It is prudent to be prepared at the trial with proof of the particulars received, otherwise the particulars annexed to the record only can be looked at. In the case of *Morgan v. Harris*, (2) the plaintiff annexed particulars of record, containing items, which were not in the particulars previously delivered under a Judge's order to the defendant, upon which items alone the plaintiff had a verdict; the Court of Exchequer held that, as the facts had not been proved at the trial, they could not direct a nonsuit to be entered, or a verdict for the defendant, on the ground of the improper alteration of the particulars under which his evidence had been admitted. A new trial without costs was granted. It seems, however, that for this gross violation of the rule of Court, the plaintiff's attorney might have been compelled to pay the costs of the first trial. (3)

False particulars annexed to the record.

Where the declaration, in addition to the common counts, contains special counts, of which no rule of practice, nor previously obtained Judge's order, calls upon the plaintiff for particulars, and the particulars, furnished to the defendant and annexed to the record, relate to the common counts only, the plaintiff will not be precluded from giving evidence in support of the special counts. (4) Thus, in an action on a bill of exchange, and for the price of goods sold and delivered, the plaintiff may recover on the bill, though the particulars relate to the goods only. (5)

Plaintiff may recover on special count, though particulars do not allude to it.

Though the bill of particulars confines the plaintiff's evidence

Plaintiff's case varied by defendant's proof.

(1) *Swain v. Roberts*, 1 M. & R. 452.

(2) 2 Cr. & J. 461.

(3) *Ibid.* See the judgments of Lord Lyndhurst and Bayley, B.

(4) *Cooper v. Amos*, 2 C. & P.

267. *Day v. Davies*, 5 C. & P. 340, and see *Fisher v. Wainwright*, 1 M. & W. 480.

(5) *Cooper v. Amos*, 2 C. & P. 267.

to the causes of action mentioned in the particulars, yet if the defendant, in giving evidence for himself, gives evidence also for the plaintiff of some claim not included in the particulars, the plaintiff, as to that claim, is no longer confined to the particulars, but may avail himself of the defendant's evidence. (1)

Separation of items.

"In an action of assumpsit brought by the assignees of a bankrupt, the defendant called for particulars of the plaintiff's demand, which were given him; he then pleaded in abatement that the promises were made by himself, and another person jointly: issue being joined on this plea, it appeared in evidence at the trial, that the particulars chiefly related to transactions between the bankrupt and the defendant, jointly with the person mentioned in the plea; and though there were some items which concerned the defendant only, yet as these were not distinguished from the rest, the Chief Justice would not suffer them to be given in evidence, and nonsuited the plaintiff. The Court of King's Bench was afterwards moved, but refused to set aside the nonsuit." (2)

Credits in particulars.

It was formerly contended, that a defendant could avail himself of credits given in particulars, only by admitting the other side of the account, (3) but the practice appears to be now settled, that particulars used as evidence must be treated like any other account furnished by a party; the jury will have to consider what credit may be due to a statement made by a party in his

(1) By Parke, B., in *Fisher v. Wainwright*, 1 M. & W. 486, recognising, to this extent, the ruling of Lord Ellenborough in *Hurst v. Watkins*, 1 Campb. 68.

(2) *Tidd's Pract.* 9th edit. 600. This case is also reported in 1 Esp. N. P. C. 452, in which it does not appear that the decision proceeded on the ground, that in the particulars the items due on the several liabilities were undistinguished. It should seem that the case as reported in *Espinasse* is not law; it constantly occurs in practice, that

part of the demand claimed by the plaintiff's particulars is answered in part by a plea of infancy, or other similar defence, and that the plaintiff is allowed to recover as to the other part, and if the plea in such a case were pleaded to the whole declaration, it seems, the verdict would be found distributively, as to part for the defendant, and as to the other part for the plaintiff, as in *Cousins v. Padden*, 2 C. M. & R. 547.

(3) See *Rymer v. Cook*, 1 M. & M. 86, n.

own favour, "and they may give credit to one part of the statement, and disbelieve the other." (1)

A difference of opinion has arisen among the Judges, upon the effect of an admission in the particulars of an answer to a part of the plaintiff's demand, as for instance, payment: on the one hand, the Court of Common Pleas, in the case of *Ernest v. Brown*, (2) have decided, that a defendant cannot avail himself of such admissions, as an answer to the plaintiff's action, unless he has put an appropriate plea upon the record; on the other hand, Parke, B., has expressed a very strong opinion that such a plea is unnecessary. The question seems to be, whether such admissions are to be considered as evidence for the defendant, or whether they are to be considered as an indication on the part of the plaintiff, that the action is not brought in respect of such sums as are covered by the payments admitted. If the former be the right view, there seems to be no reason, why there should be an exception to the general rule, that evidence in bar of an action can be admitted only under an appropriate plea; if the latter be the right view, there cannot be any occasion for a plea, for there can be no necessity to plead to that which forms no part of the subject of the action. The operation of particulars which claim only a certain sum, much smaller than that which is inserted by the special pleader in the indebitatus counts, seems clearly to be in the latter mode; in pleading, the residue above the sum mentioned in the particulars is answered by the traverse in the general issue, and whatever may be the original amount of the plaintiff's claim, or the manner in which it has been reduced to the sum claimed in the particulars, is quite immaterial, the plaintiff cannot be allowed to go into any such questions. If it be considered, as seems to be shewn by the case of *Howard v. Booth*, that the particulars operate upon the evidence, and not upon the record, it may be suggested that there is no difference in point of principle between such a case, —in which it appears, upon evidence in the course of the trial,

Effect of admissions, credits, &c.

(1) By Parke, B., in *Kenyon v. Wakes*, 2 M. & W. 768. (2) 3 Bing. N. C. 674.

Effect of giving
credit.

that the plaintiff's claim has been larger than that which he seeks by the particulars to recover,—and a case in which the particulars shew the same facts, and differ only by stating, on the face of them, the manner in which the claim has been reduced to the amount demanded as the balance: *ex. gr.* if the particulars were for three years' rent at 40*l.*, and credit were given for payment of two years.

Coates v.
Stevens.

In the case of *Coates v. Stevens*, (1) (in which the question was upon the proper mode of pleading payment of money into Court,) there was a plea of payment of the sum of 10*l.*, and a payment of that sum was admitted in the particulars; Parke, B., said, there was no necessity to plead the payment, if the plea were intended to apply to the sum mentioned in the particulars. However, in the case of *Ernest v. Brown* (2) the point directly arose, and the Court of Common Pleas decided, that an admission in the particulars is no more than evidence of payment, and that it could not be received in bar of the action without a plea of payment. In debt for goods sold and delivered, the particulars were:

" For a cart sold	-	-	-	-	£5	0	0
Deduct the sum paid by Mr. Brown	-	-	-	-	1	13	0
					<hr/>		
					£3	7	0"

Kenyon v.
Wakes.

Issue was joined on the sufficiency of a payment of 3*l.* 7*s.* into Court. The opinion of Parke, B., in *Coates v. Stevens*, being cited, Tindal, C. J., said, "That was an action of assumpsit: this is debt, and you plead you were *never* indebted." In the case of *Kenyon v. Wakes*, (3) the particulars in an action of assumpsit claimed a sum of 148*l.* for wages and money paid, and admitted "payments on account" of 70*l.*: the defendant pleaded non-assumpsit. At the trial, the defendant contended, and the jury found, that at the rate of wages, which only the plaintiff was entitled to charge, the 70*l.* were sufficient to cover the plaintiff's demand. The defen-

(1) 2 Cr. M. & R. 118.

(2) 3 Bing. N. C. 674.

(3) 2 M. & W. 764.

dant had the verdict. At the trial it was objected, that the defendant could not avail himself of the credit side of the particulars, without admitting the correctness of the debit side, and upon that objection, as well upon the ground that the plaintiff was at all events entitled to nominal damages, there being no plea of payment on the record, a rule was made absolute for a new trial. Lord Abinger, though professing not to decide the second point, on the ground that it was not taken at the trial, gave judgment in the following terms: "The particulars were put in to shew, that the plaintiff limited his claim to the balance, if any, due for wages. The jury were of opinion, there was no balance due. The particulars only claimed a balance, which was destroyed by the finding of the jury;" and Parke, B., again expressed his opinion, that a plea was unnecessary. "Had it not," said the learned Judge, "been for the decision of the Court of Common Pleas, in *Ernest v. Brown*, I should have had little or no doubt on the subject. Before that case, I entertained a strong opinion, and so expressed it in *Coates v. Stevens*, that such a payment need not be pleaded. I thought that the particulars were given to the defendant to enable him to know what to plead, as well as to restrain the plaintiff to the claim in his declaration. In that view I agree with the decision of Patteson, J., in *Booth v. Howard*, that the particulars are for the benefit of the defendant. It is said, that in *Ernest v. Brown*, a distinction was taken between debt and assumpsit, with reference to this point. I cannot understand that distinction, nor am I at present satisfied that my first impression on this point, which I expressed in *Coates v. Stevens*, was wrong." Later in the same term, in the case of *Nicholl v. Williams*, (1) the point came again incidentally before the Court of Exchequer, on a question as to what part of the plaintiff's demand a plea of payment must be presumed to have been intended to apply, the particulars not having been adverted to at the time; and Parke, B., in delivering the judgment of the Court, (that under the circumstances of this case, it must be applied to the payments admitted in the particulars,) said, "if the decision of the Court of Common Pleas, in

Effect of giving credit.

(1) 2 M. & W. 758.

Ernest v. Brown, be right, there can be no question as to the meaning of the plea. We do not, however, feel it necessary to decide whether the defendant was bound to plead payment, after such a particular as this." The rule T. T. 1, W. 4, requires, under a certain penalty, that particulars should be annexed to the record; previously it had been ruled, (1) that if the defendant wished to avail himself of them, to prove a part-payment, he must have put them in as his evidence, treating them "merely as an admission requiring proof, as other admissions do," and which would entitle the plaintiff to the reply.

CHAPTER III.

OF THE EXAMINATION OF WITNESSES.

AFTER considering, in the last chapter, what kind of evidence ought to be produced for ascertaining the points in issue, the next subject of inquiry relates to the manner in which witnesses are to be examined.

Examination
as to interest.

The ordinary mode of proceeding in the Courts of Common Law, preparatory to the examination of a witness, is to swear him in chief, unless an objection should be made to his competency; in which case, the practice formerly was to examine him on the *voire dire*; and this was so strictly observed, that, if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. (2) But, in later times, the rule has been to a certain extent relaxed, and now, if it should be discovered in any stage of the trial, before the close of a witness's examination and before his dismissal, that he is interested, his evidence will be rejected. This is as well for the convenience of the Court, as for the purposes of justice. The examination of a witness, to discover whether

(1) By Hullock, B., (after consulting Bayley, J.) in *Rymer v Cook*, M. & M. 86, n.

(2) See Lord Lovat's case, 9 St. Tr. 639, 646, 704.

he has any interest in the cause, is frequently to the same effect as his examination in chief; it therefore saves time, and is more convenient, that the witness should be sworn in chief in the first instance; and if it should afterwards appear, in the progress of the examination, that he is interested, it will then be time to take the objection. (1)

Where, however, witnesses have been examined on interrogatories, and it appeared that the witnesses were incompetent, the objection should be taken by motion to suppress the interrogatories; it is too late to take it at the trial. (2)

Interrogatories.
Interest appearing on cross-examination.

This relaxation of the ancient rule, does not extend so far, as to allow the counsel on the cross-examination to ask the witness every sort of question, which might be proper on the *voire dire*. For example, after an examination in chief, a witness is not to be cross-examined as to the contents of a will, not produced in Court, under which it is suggested that he takes some interest, although such questions might be properly asked in an examination on the *voire dire*. (3) Though in general, questions as to competency may be asked, notwithstanding that they depend upon the contents of a written instrument, yet, if the witness produce the instrument to which the questions relate, that must be read as in other cases. (4)

Cross-examination as to interest under a will.

When the witness has been regularly sworn, he is first examined by the party who produces him; after which, the other party is at liberty to cross-examine. The examination is in open Court, in the presence of the parties, their attorneys, and counsel, and before the judge and jury, who have thus an opportunity of observing the understanding, demeanour, and inclination of the witnesses.

It may often be advisable to examine witnesses separately, Separate examination.

(1) *Turner v. Pearte*, 1 T. R. 717. *Perigal v. Nicholson*, 1 Wightw. 64. *Stone v. Blackburn*, 1 Esp. N. P. C. 37. *Beeching v. Gower*, Holt, N. P. C. 313.
(2) 2 Tidd. 9 edit. 812, and see

Ogle v. Palecki, Holt, N. P. C. 485.
(3) *Howell v. Lock*, 2 Campb. 14.
(4) *Butler v. Carver*, 2 Stark. 434.

and out of the hearing of each other, with a view to obviate the danger of a concerted story among the witnesses, and to prevent the influence which the account given by one may have upon another.* For this purpose, the Court will order witnesses to withdraw. It was formerly said, that if any witness, who had been ordered to withdraw, continued in Court, in violation of such order, the Court would not afterwards permit him to be examined; but it has been more recently considered, that it is in the Judge's discretion whether or not the witness should be examined. (1) In one case, (2) it was said by Alderson, B., that the circumstance of a witness having remained in Court in disobedience of an order to leave, is no ground to reject his evidence, it merely affording matter of observation upon it; and the learned Judge referred to a case, (3) in which a new trial was granted, because a witness's testimony had been rejected on that ground. The rule appears to be the same (4) in the Exchequer as in the other Courts, except in revenue causes, where it is inflexible, that the witness cannot be examined. (5) But an attorney in the cause, whose attendance is necessary in Court to instruct his counsel, is usually excepted from the order to withdraw. (6)

Leading questions.

Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief; in cross-examination, however, they are allowed. (7)

(1) *Parker v. M'William*, 6 Bing. 683. *Rex v. Colley*, M. & M. 329. *Beamon v. Ellice*, 4 C. & P. 585. *Thomas v. David*, 7 C. & P. 350.

(2) *Cook v. Nethercote*, 6 C. & P. 741.

(3) Reported in note to *Cook v. Nethercote*.

(4) *Ib.* By Coleridge J., in *Thomas v. David*, 7 C. & P. 350.

(5) *Att. Gen. v. Bulpit*, 9 Price, 4.

(6) *Pomeroy v. Baddeley*, 1 Ry. & Mo. 430. *Everett v. Lowdham*, 5 C. & P. 91.

(7) The policy of these rules, as well as of almost every other of the English law, is attacked by Jeremy Bentham; See *Rationale of Judicial Evidence*, B. 3, c. 3. *Suggestive Interrogation*.

* By the law of Scotland, this separate examination takes place in all criminal prosecutions. The rule there is, that if a witness has been present in Court during the examination of another witness, so as to hear his evidence, he will be rejected. See *Hume's Com. on Crim. Law of Scotland*, 2 vol. 365. *Burnet's Treatise*, 467.

These rules proceed partly, on the assumption that the witness is favorable to the party who calls him, and opposed to his adversary, and accordingly, the rule first mentioned, is relaxed, wherever it clearly appears that the witness is hostile, and that a more searching mode of examining him is necessary to elicit the truth. A party, in preparing to support his case by testimony, has the opportunity of examining the witnesses before the trial, to produce at the trial them only, whose testimony he thinks most likely to serve him,—the assumption, therefore, that the witness is favorable to the party who calls him, seems by no means unreasonable; and in practice, the fact is well known to support it. Questions are objectionable as leading, not only when directly suggesting the answer which is required, but also those which, embodying a material fact, admit of an answer by a simple negative or affirmative, though the question does not suggest which, even supposing the answer to be *bond fide*. In such cases, as well as in those where direct leading questions are put, the evidence is presented to the Court or jury, which is to judge of the effect of it, not as it would be if it were the unassisted testimony of the witness, but in the form, and with the colouring, that are prompted by professional skill, and a previous knowledge of the case which it is desired to prove. If such a mode of proof were admitted, there would not be the same probability, that a witness would state the whole transaction, and part only might be elicited; the chance too, of detecting discrepancies in perjured or mistaken testimony, would be diminished; nor are these objections removed by the power of cross-examination, which, as it often must be conducted without previous knowledge of the answers which the witness will give, is not a counterbalance to the facility afforded of presenting a selected portion of the evidence in chief. If this reasoning is to be considered as the foundation of the prohibition of leading questions, it evidently does not apply in the same degree to a question suggestive of some material fact, which the witness has omitted in his answers to an examination strictly and regularly conducted. No rules can, however, be laid down, as to the questions which such a state of things would permit;

Evidence in chief.
Leading questions.

Suggestive questions.

Leading questions.

Failure of memory.

this part of the administration of the law is peculiarly regulated by the discretion of the presiding Judge, the exercise of which will be governed by his view of the demeanour of the witness, and the other circumstances of the case. Sometimes, when an omission is evidently caused by want of memory, a suggestion may be permitted to assist it. As where a witness, called to prove the partnership of the plaintiffs, is not able at that moment to specify the several names of the partners, a number of names, containing those of the partners, among others, may be suggested to the witness, for the assistance of his memory. (1) There are other cases in which some suggestive assistance is allowed to be given to the witness, as where he is called to prove a delivery of goods, consisting of numerous items, or delivered at different periods. Such cases evidently do not fall within the principle of the prohibition of leading questions.

Introductory.

Questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the cause, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked, whether the one defendant has interfered in the business of the other. (2)

Unwilling witness.

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the Court will in its discretion relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. Where an issue has been directed, with a power to examine one of the parties, it will be competent to the counsel of the opposite party to cross-examine him;

(1) *Acerri v. Petroni*, 1 Stark. N. P. C. 100.

(2) *Nicholls v. Dowding* and an-

other, 1 Starkie, N. P. C. 81, by Lord Ellenborough.

because, as party, he must be considered as necessarily adverse. (1)*

Leading questions.

It is to be considered, how far leading questions are proper, in the examination of a witness in chief, when the object is to prove, that another witness, who has been examined on the opposite side, has, on some former occasion, made a different and contradictory statement. If, for example, a witness on his cross-examination were to deny, that he ever gave a different account of the transaction, or that, in conversing upon the subject with a third person, he used certain words or expressions imputed to him, would it be competent to the counsel on the opposite side, in examining that third person in chief as his witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or used such and such expressions? This form of putting the question is certainly not uncommon, and frequently passes without objection. But a very little consideration will show, that such a leading question is irregular. For, in the first place, it must evidently be quite unnecessary to lead the witness to such a length; it would be sufficient to lead him up to the subject of the conversation; and, that being done, the most regular course would be, to inquire generally, what the former witness said or what account he gave, relative to the transaction in question, thus leaving him, as in fairness he ought to be left, to the use of his own memory. If the witness has a distinct recollection of the conversation, and of the representation made by the other person, whose account is now disputed, he requires only to have his attention directed to the subject, to enable him to speak what he knows: if he has not that distinct recollection, he is ill-qualified

Leading, preparatory to contradicting a former witness.

(1) *Clarke v. Saffery*, 1 Ry. & Mo. 126.

* The rule adopted by the courts of justice in Scotland, on the subject of leading a witness, appears to be much stricter than in this country. No distinction is allowed, according to their practice, between willing and unwilling witnesses, or between an examination in chief and a cross-examination. (a)

(a) See Burnet on Crim. Law of Scotland, p. 465.

Leading questions.

to contradict the other witness, as to the expressions supposed to have been used by him ; in other words, he is incompetent for the purpose for which he is called. The plea of necessity, therefore, altogether fails. But the principal objection to such leading questions appears to be, that they suggest the desired answer so broadly and obviously, that a witness of the dullest intellect and weakest memory can hardly fail to take the hint, and may easily shape his evidence, if he is so disposed, as may best serve the interest and wishes of the party who calls him. In effect, the question puts into the mouth of the witness the very words, which he is to echo back either in the affirmative or in the negative ; thus supplying a forgetful witness with a false memory, and an artful witness with a prompt and concerted answer. Is there then, any thing in the nature of this particular case, which ought to exempt it from the general rule applicable to examinations in chief ? On the contrary, if there is any case, in which that general rule against leading ought to be strictly maintained, it is the one now under consideration, where a witness is called for the purpose of proving the account, given by another witness, to be inconsistent with some former statement, supposed to have been made by him. Whether the question at issue between the two witnesses, is a question of credit, or whether it is to be considered rather as a question of mere memory, leading is, in either point of view, equally objectionable. If it is a question of memory, the only fair way of trying it is by allowing the witness to speak for himself unprompted, as his own memory may suggest. If the question is one of credit, then it is undoubtedly due to the witness, whose veracity is impeached, that the contradictory statement, supposed to have been made by him, should be distinctly proved, without the aid of leading, and without any undue influence. Upon the whole, therefore, the most unexceptionable and proper course appears to be, to ask the witness, who is called to prove a contradictory statement made by another witness, what that other witness said relative to the transaction in question, and not in the first instance to ask, in the leading form, whether he said so and so, or used such and such expressions. After an answer has been given to

such inquiry, it would be proper for the purpose of making the contradiction more complete, to ask whether the former witness has, or has not, used the expressions imputed to him. (1) In the case of *Courteen v. Touse*, (2) Lord Ellenborough allowed the counsel for the defendant to put a leading question to a witness called by him, in order to contradict a witness who had been called by the plaintiff. In that case, one of the witnesses of the plaintiff, having been cross-examined as to the contents of a letter, received by him from the plaintiff, (which letter had been lost), and having mentioned in his cross-examination some particular expressions as part of the contents, witnesses were called on the part of the defendant, to speak to the contents of the same letter, and Lord Ellenborough allowed the defendant's counsel to ask one of the witnesses, who had first stated all he recollected of the letter, whether it contained the particular words and expressions, as represented by the plaintiff's witness. Here the object of the examination was (not, as in the case above supposed, to show that a former witness had given two different representations of the same transaction), but to ascertain a material fact in the case by means of the plaintiff's letter; and as the plaintiff's witness had stated what he conceived to be the language of the letter, and the defendant's witness had, on the other side, given his account of its contents, it then became perfectly reasonable to allow the question, whether the letter contained such expressions, as represented by the witness on the other side, or any to that effect. Lord Ellenborough held, that "after exhausting the witness's memory as to the contents of the letter," (not, however, by leading questions, but by examining him in the regular manner,) the witness might then be asked, whether it contained a particular passage, recited to him, which had been sworn to on the other side; otherwise it would be impossible ever to come to a direct contradiction."

Leading questions.

The most direct mode admitted, and that which most frequently occurs in practice, of assisting a witness in giving his

Refreshing memory, by memoranda.

(1) See *Edmonds v. Walter*, 3 Stark. N. P. C. 8.

(2) 1 Campb. 43.

Refreshing
memory, by
memoranda.

testimony, is by allowing him to look at a written instrument which he has before seen, relating to the facts in question. It must be observed, that written memoranda, used for this purpose, do not contribute to the manifestation of truth in the same degree as instruments executed by, and binding upon the parties. Such memoranda may often contain only just so much matter as may serve to recall the witness's recollection to parts of the transaction, thus not supplying, as to other parts, the most efficacious means for the discovery of truth, namely, the opportunity of obtaining by cross-examination a knowledge of all the circumstances, to which the evidence relates. And where there is a suspicion of *mala fides* in the witness, the means for detecting it, afforded by the prompt and searching practice of question and answer, are evidently lost; and the witness may repeat successfully in Court an unfair and partial statement, which he has prepared out of Court: (1) nor is the danger of the latter mischief excluded by restricting the allowance of this assistance to such memoranda made by the witness contemporaneously with the fact to which they refer. On the other hand, the value of this kind of assistance to a witness is evident in some cases,—as, when in the mass of facts to be proved, a certain degree of complication exists, “the union of completeness and correctness will, in the instance of every man, be manifestly impossible; take, for instance, a mass of pecuniary accounts,” or mere dates. (2) Upon the whole, the balance of convenience is in favour of the admission of this kind of evidence. The circumstances of each case, in which it is admitted, will afford the means of ascertaining its precise value and weight: in some cases, the evidence thus obtained may be of the most satisfactory kind; in others, it may be entitled to little or no consideration.

There seem to be three classes of cases, in which evidence of this kind is admitted:—first, where the writing is used only for

(1) See in Hardy's case, 24 St. Tr. 962, Lord Erskine's eloquent comment upon some evidence of

this kind, given by a spy and informer.

(2) Bentham, cited *supra*, p. 886.

the purpose of reviving or assisting the memory of the witness, and to bring to his mind a recollection of the facts; secondly, where the witness recollects having seen the writing before, and, though he has no independent recollection of the facts mentioned in it, yet remembers that, at the time he saw it, he knew the contents to be correct; thirdly, where it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which, nevertheless, enables him to swear to a particular fact, from the conviction of his mind on seeing a writing which he knows to be genuine; as, for instance, where a banker's clerk is shewn a bill of exchange which has his writing upon it, from which he knows that the bill has passed through his hands, though he has no recollection of that fact, nor of his writing anything upon the bill. In the two latter cases, the witness, though he may have no present independent recollection, must, on seeing the paper, be able to depose positively to the facts, as to which he is examined. (1)

Refreshing
memory, by
memoranda.

In the first class of cases, where a witness admits his memory to have been revived by the previous inspection of a writing, it does not seem to be required, as a condition of the admission of his oral testimony, that the writing should be produced in Court; (2) the case seems to differ in degree only from many others, in which memory is revived, by reference in the mind of a witness to any circumstance, to which his attention may have been drawn with a peculiar degree of force. The absence, however, of the writing, would of course, afford matter of observation. If it is produced, the counsel for the other party has a right to see it, and cross-examine from it. (3) Where a writing has not the effect of reviving the witness's memory, but yet enables him to speak positively to a fact, so that his testimony depends upon his inference from the writing, the writing must be produced. (4)

Whether the
writing must be
produced.

(1) See *Rex v. St. Martin's, Leicester*, 2 Ad. & E. 210.

(2) *Kensington v. Inglis*, 8 East, 273. *Burton v. Plummer*, 2 Ad. & El. 341.

(3) *Rex v. Hardy*, 24 Howell's

St. Tr. 824. *Sinclair v. Stevenson*, 1 C. & P. 582. *Rex v. Ramsden*, 2 C. & P. 603.

(4) *Doe v. Perkins*, 3 Tr. R. 754. *Tanner v. Taylor*, *ibid.* n. *Howard v. Canfield*, 5 Dowl. P. C. 417.

Refreshing
memory.
Unstamped, or
other inadmis-
sible writing.

In this last case, namely, where a witness speaks positively to a fact from seeing a written paper, though he does not distinctly remember the fact therein stated, it is material to consider, in what mode, and through what medium, the fact is proved,—whether it is proved by the written paper, or by parol testimony; for if it were taken, as proved by the writing, not by the parol testimony of the witness, the question would then arise, whether a writing, which, from the nature of the subject-matter, would require a stamp, can be used by the witness, if unstamped. It is clear, in the case proposed, the fact is proved by the parol testimony of the witness, not by the writing: the writing alone could not be admitted, as the proper and legitimate evidence of the fact; nor can it be justly said, that the writing itself becomes evidence, from being used by the witness. This point has been decided. In the case of *Maugham v. Hubbard and another*, (1) assignees of *Lancaster*, which was an action for money had and received, the bankrupt, being called by the plaintiff to prove a receipt of a sum of 20*l.* by him from the plaintiff, stated, that in November 1822, 20*l.* were received from the plaintiff, and not carried to the account. A rough cash-book kept by the plaintiff was then put into his hands, in which there was the following entry:—"4th Nov. 1822, Dr. R. Lancaster, check 20*l.* R. L." The witness then said, "the entry of 20*l.* in the plaintiff's book has my initials, written at the time; I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money." The paper not having been stamped, the admission of this evidence was objected to, but Lord Tenterden, "was of opinion, that though it was not itself admissible in evidence to prove the payment of the money, the witness might use it to refresh his memory, and that his saying, he had no doubt that he had received the money, was sufficient evidence of the fact." On a motion being made for a new trial, Lord Tenterden said, "Here the witness, on seeing the entry signed by himself, said, he had no doubt that he had received the money. The paper itself was not used as evidence

(1) 8 B. & C. 14.

of the receipt of the money, but only to enable the witness to refresh his memory; and when he said that he had no doubt he had received the money, there was sufficient *parol evidence* to prove the payment." Mr. Justice Bayley added, "Where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says, he is thereby sure, that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, though the witness should add, that he has no recollection of the fact of the execution of the deed." (1)

Refreshing
memory.

Where a witness, on looking at a written paper, has his memory so refreshed, that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him: (2) So also, where the witness recollects that he saw the paper, when the facts were fresh in his memory, (3) and remembers that he then knew the particulars therein mentioned to be correctly stated. But where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable, as hearsay; the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said.

Memorandum,
by whom
written.

Upon the question, as to the time when the written memorandum should have been made,—whether it must be contemporaneous with the fact, or recently after the fact, or how long after it may be made,—the decisions, as might be expected, lay down no precise rule. There seems to be no good reason for saying, that a writing is not to be allowed for the purpose of

When writing
must have been
made.

(1) And see *Rex v. St. Martin's*, Leicester, 2 A. & E. 213.

(2) *Duchess of Kingston's case*, 11 Harg. St. Tr. *Hardy v. Lee*, 2 Ch. 124. *Doe v. Perkins*, 3 T. R. 749. *Jacob v. Lindsay*, 1 East, 460. *Burton v. Plummer*, 2 Ad.

& E. 341, and see the judgment of Patteson, J., in *Rex v. St. Martin's*, Leicester, 2 Ad. & E. 215.

(3) *Barrough v. Martin*, 2 Campb. 112. *Burton v. Plummer*, 2 A. & E. 341, and see *Jacob v. Lindsay*, 1 East, 460.

Refreshing
memory.

refreshing a witness's memory, unless made contemporaneously with the fact which it records; but certainly it ought to have been made either at that period, or recently after, or at the utmost before such a length of time has elapsed, as to render it probable that the memory of the witness might have become deficient. The principle being adopted, that a witness's memory may be assisted by a written paper or memorandum, it follows that no precise limited time can consistently be fixed, within which a writing must be shewn to have been made, before it can be used by the witness. A memorandum made long after the fact, may be to some witnesses of much greater use, than even a contemporaneous memorandum will be to others. The effect of a memorandum, in assisting a witness, will depend upon the state of his memory, and the time when the memorandum was made,—which will vary in different cases.

In a case cited by Lord Kenyon, (1) a motion was made in Chancery to suppress depositions on a certificate from the commissioners, that the witness refreshed her memory by minutes, consisting of six sheets of paper of her own handwriting, the substance of which she declared she had set down from time to time, as the facts occurred to her memory; that five of the six sheets were drawn up in the form of a deposition by the plaintiff's solicitor, whom she had requested to digest her notes, and reduce them to some order, and that after he had done so, she transcribed, and altered them, wherever it was necessary to make them consistent with her meaning. The Lord Chancellor, in giving judgment, said, "Should the Court connive at such proceedings as these, depositions would really be no better than affidavits; for should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from memoranda furnished by the witness, I might as well let the attorney draw an affidavit for her, and use that instead of a deposition." "To be sure, in some cases, a man may use papers at law, but I have known some Judges (and I think I adhered chiefly to that rule myself) let

(1) In *Doe v. Perkins*, 3 T. R. 752.

them use only papers drawn up as the facts happened, and all other papers I have bid them put in their pockets; and if any had been offered, which were drawn by the attorney, I should have reprimanded him severely. As to dates and names, which are merely technical, it is quite another thing." (1)

Refreshing
memory.

It seems that a witness cannot be permitted to refresh his memory by a copy of a writing, (not in the nature of a duplicate original,) though the copy was made by himself, and though the writing itself might be legitimately used for that purpose. In *Jones v. Stroud*, (2) it was ruled by Best, C. J., that a witness could not use a copy of a contemporaneous memorandum, made six months after the facts, though the witness stated that the original could not be found, and that, when lost, it was illegible from being covered with figures. This decision, it is to be observed, is more exclusive, than analogy to the general rule, respecting the admission of secondary evidence when the original cannot be produced, would seem to warrant; but, indeed, unless this stricter rule is observed, secondary evidence of the contents of a lost writing might be given by one witness, and another witness might be called to prove that he remembers the writing contained a correct statement, though he has now forgotten what that statement was. It appears difficult to distinguish the case of a copy, made by a witness who is to give the testimony, from the case of a copy made by another witness, and sworn by him to be correct. In the case of *Burton v. Plummer*, (3) Patteson, J., said, "The copy of an entry, not made by the witness contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness' memory. The rule is, that the best evidence must be produced; and that rule appears to me to be applicable, whether a paper be produced as evidence in itself, or used merely to refresh the memory." The decisions also, (4)

Copies.

(1) In *Sandwell v. Sandwell*, Comb. 445, the expression attributed to Holt, C. J., is, that the memorandum must have been made "presently," in *Jones v. Stroud*, 2 C. & P. 196, by Best, C. J., it

must have been made "near the time."

(2) 2 C. & P. 196.

(3) 2 Ad. & El. 343.

(4) *Ante*.

**Refreshing
memory.**

which shew that the paper, used to refresh memory, must be produced in Court, seem to be direct authorities against the use of a copy in the like cases; for 'if the original writing cannot be dispensed with, upon the same principle, by which *parol* secondary evidence of the contents of the writing is rejected, *written* secondary evidence must also be rejected.

Other cases.

Lord Kenyon, in the case of *Vaughan v. Martin*, (1) allowed a deposition, formerly made by an aged witness, to be read to him at a trial to refresh his memory. And in *Cato v. Howard*, (2) where a witness had received money, and given an unstamped receipt for it, and the witness was blind, Lord Tenterden permitted the receipt to be read to him in Court for the same purpose. Where a plaintiff had entered an account in writing of goods and money, which from time to time were forwarded to the defendant, and the defendant had, by his signature, at the foot of each page, admitted the truth of the items, but the writing itself could not be given in evidence for want of receipt stamps; it was held, that the plaintiff might prove that, upon calling over each article to the defendant, he admitted the receipt, and that the witness, who heard him, might refresh his memory by referring to the account. (3)

**Belief of a
witness.**

A witness can depose to such facts only as are within his own knowledge; but, even in giving evidence in chief, there is no rule, which requires a witness to depose to facts with an expression of certainty that excludes all doubt in his mind. It is the constant practice to receive in evidence a witness' belief of the identity of a person, or of the fact of a certain writing being the hand-writing of a particular individual, though the witness will not aver positively to these facts. (4) It has been decided, that, for false evidence so given, a witness may be indicted for perjury. (5)

(1) 1 Esp. 440.

(2) 3 Stark. 3.

(3) *Jacob v. Lindsay*, 1 East, 460.(4) See the judgment of De Grey, C. J., in *Miller's case*, 3 Wils. 427.(5) *Pedley's case*, 1 Leach, C. C. 325.

The opinion of a witness, in general, is not evidence; the witness must speak to facts. But on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but they are allowed also to give their opinions in evidence. The opinion of medical men is evidence as to the state of a patient, whom they have seen. Even, in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state, detailed by other witnesses at the trial, their opinion on the nature of such symptoms has been properly admitted. Thus, on a question of sanity, medical men have been permitted to form their judgment upon the representations, which witnesses at the trial have given of the conduct, manner, and general appearance exhibited by the patient. (1) So, in prosecutions for murder, they have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death.

Opinion of witness.

Of medical men.

The opinion of a person conversant with the business of insurance, on the question whether a premium would have been increased by the communication of particular facts, has been thought admissible, as judgment in a matter of trade. (2) But the reception of this evidence, though sanctioned by the decision of the Court of King's Bench, in the case of *Richards v. Murdock*, (3) by the ruling of Holroyd, J., (4) and in some degree by the Court of Common Pleas, in the case of *Chapman v. Walton*, (5) is opposed to the opinion of Lord Mansfield, expressed in the case of *Carter v. Boehm*, (6) and of C. J. Gibbs, in the case of *Durrell v. Bederley*. (7) It was also discountenanced by Lord Kenyon. This point came before the Court of King's Bench, in the late case of *Campbell v.*

Of underwriters.

Campbell v. Richards.

(1) Wright's case, Russ. & Ry. Cr. C. 456. Although they may be admitted, after hearing such evidence, to give their opinion, whether certain symptoms are symptoms of insanity; it seems, they are not competent to give an opinion, whether an act, for which a prisoner is tried was an act of in-

sanity. *Ib.*(2) *Berthon v. Loughman*, 2 Stark. N. P. C. 258.

(3) 10 B. & C. 527.

(4) In *Berthon v. Loughman*, 2 Stark. N. P. C. 283.

(5) 10 Bing. 57.

(6) 10 Bing. 57.

(7) *Holt*, N. P. C. 283.

Opinion of
witness.

Rickards, (1) in which the conflicting decisions were cited. (2) The Court took time to consider their judgment, which they ultimately pronounced to be, that such evidence is inadmissible. "Witnesses," said Lord Denman, in delivering the judgment of the Court, "conversant in a particular trade, may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another. We think the jury are to decide on the materiality of facts, and the duty of disclosing them."

Chapman v.
Walton.

In an action (3) against a policy broker for negligence in not effecting a policy of insurance in the proper form, it appeared, that a valid policy had been originally effected, but alterations in the voyage were afterwards made and communicated to the plaintiff in a letter, which letter he transmitted to the defendant, as instructions, that corresponding alterations might be made in the policy; some alterations were, in consequence, procured by the defendant, but not sufficient to make the policy cover the altered voyage; it was held, that the opinion of brokers was admissible as to what was the duty of the defendant under the circumstances. "That," said Tindal, C. J., in delivering the judgment of the Court, "is a question of fact, the decision of which appears to us to rest upon this further inquiry, *viz.* whether other persons exercising the same profession or calling, and being men of experience and skill therein, would, or would not, (upon reading the letter,) have come to the same conclusion as the defendant."

Ship-builders.

Ship-builders have been admitted to state their opinion on

(1) 5 B. & Adol. 840.

(2) The case of *Chapman v. Walton* was decided in the previous term, it was probably not reported, and it does not appear to have been cited.

(3) 10 Bing. 57. It is to be observed, that this decision professes

to proceed in some degree on two cases, which were overruled in the case of *Campbell v. Rickards*, decided in the King's Bench in the following term, *viz.* *Barthou v. Loughman*, and *Rickards v. Murdock*.

the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present. (1) In an action of trespass, alleged to have been committed in making an embankment, which was said to have gradually choked up a harbour, an engineer was permitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour. (2) Where the question is, whether a seal has been forged, seal-engravers may be called to show a difference between a genuine impression and that supposed to be false. (3) Engineers. And the opinion of an artist in painting, is evidence as to the genuineness of a picture. (4) So, it seems, is the opinion of any person, in the habit of receiving letters, of the genuineness of a post-mark. (5) But where, in an action for a libel on a physician, the defendant pleaded in justification of a statement, that a certain physician, in refusing to meet the plaintiff in consultation, "had honourably and faithfully discharged his duty to his medical brethren," it was held, that the opinion of other medical practitioners could not be received in evidence upon the point, whether the physician in question, had honourably and faithfully discharged his duty, as alleged, in refusing to meet the plaintiff. (6) Artists.

It is proposed now to inquire, whether a party can be allowed to discredit his own witness, that is, produce evidence, which may have the effect of throwing discredit upon him. It is clear, a party is not to be sacrificed to his witness; he is not represented by him, nor to be identified with him; nor ought he to be bound by all that the witness may say. On Whether a party may discredit his own witness.

(1) *Thornton v. Royal Exchange Assurance Company*, Peake, N.P.C. 25. *Chaurand v. Angerstein*, do. 43. *Beckwith v. Sydebotham*, 1 Campb. 117.

(2) *Folkes v. Chad*, 1783, MS. S. C. cited by Buller, J., in *Goodtitle v. Braham*, 4 T. R. 498.

(3) By Lord Mansfield, in *Folkes v. Chad*, *ib.*

(4) On the admissibility of opinion, as to the genuineness of hand-writing, *vide ante*, p. 696.

(5) See *Abbey v. Lill*, 5 Bing. 299.

(6) *Ramadge v. Ryan*, 9 Bing. 333.

the other hand, a party ought to be placed under such restrictions, as may be necessary for preventing unfair or dishonest practice. If a party produces a witness, knowing him at the time to be a man of infamous character, and the witness, in giving evidence, disappoints or deceives him, shall the party be allowed to prove his infamy, for the purpose of destroying the effect of his evidence? If a party, not acting himself a dishonest part, is deceived by his witness, or if a witness, professing himself a friend, turns out an enemy, and having promised proof of one kind, gives evidence directly contrary,—is the party to be restrained from laying the true state of the case before the Court? If a witness, whether from mistake, from ignorance, or from design, gives evidence unfavourable to the party who calls him, is the party to be restrained from calling other witnesses, to prove facts different from those represented by the former witness? These are some of the questions, which will occur to the reader, on the first view of the subject; and which, one might think, it would not be difficult to answer.

Not to discredit
by general
evidence.

In the first place, it is laid down, a party will not be permitted to discredit his own witness by general evidence. The meaning of this rule is, that a party cannot prove his own witness to be of such a general bad character, as would render him unworthy of credit. "This," says Mr. Justice Buller, "would enable him to destroy the witness, if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit, if he spoke against him." (1) But it is now clearly settled, that a party may prove, by other evidence, the truth as to a material fact relevant to the issue in a cause, though it may collaterally have the effect of discrediting his own witness. (2) If witnesses had been called before the adverse witness, their evidence

Facts may be
proved other-
wise.

(1) Bull. N. P. 297.

(2) Bull. N. P. 297. *Lowe v. Jolliffe*, 1 Bl. 365. *Pike v. Badnaring*, cited 2 Str. 1096, *cf. Alexander v. Gibson*, 2 Campb. 556. *Richardson v. Allan*, 2 Stark.

N. P. C. 334. *Ewer v. Ambrose*, 3 B. & C. 423. *Bradley v. Ricards*, 8 Bing. 57. *Friedlander v. The Royal Exchange Assurance Company*, 4 B. & Ad. 193. *Wright v. Beckett*, 1 M. & R. N. P. C. 429.

must have been received without objection, and it cannot make any real difference in the case, that a witness giving adverse testimony has been called first. This rule is equally applicable, whether a witness is forced upon a party by law, (as, in the case of a subscribing witness to a deed,) or is voluntarily selected to give evidence.

A party discrediting his own witness.

In the case of *Alexander v. Gibson*, (1) therefore, where the question was, whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, and the servant swore, on being called by the plaintiff, that he had not given any warranty, Lord Ellenborough allowed the plaintiff to call another witness to prove, that at the time of the sale the servant had expressly warranted its soundness. "There can be no rule of law," said Lord Ellenborough, "by which the truth on such an occasion is to be shut out, and justice perverted." "If a witness is called, and gives evidence against the party calling him, I think, he may be contradicted by other witnesses on the same side, and that, in this manner, his evidence may be entirely repudiated."

In the case of *Friedlander v. The London Assurance Company*, (2) an action on a policy of insurance against fire, an issue was joined as to the quantity and value of the goods on the insured premises at the time of the fire; several witnesses were called to prove the sale of goods to the plaintiff, and the delivery of them on the premises; one witness, called for the same purpose, being shewn an invoice and letter in his own handwriting, admitted, on his examination in chief, that he wrote the invoice, but denied that he sent any goods, and said that the invoice was made out by him after the fire, in the presence of the plaintiff's son and of his shopman, that the letter was in fact written in London at the plaintiff's house and by his desire, and that the plaintiff's son and shopman had persuaded him to say he sent the goods. It was then proposed to recal (3)

(1) 2 Campb. 556.

(2) 4 B. & Ad. 193.

(3) They had both been examined before.

A party discrediting his own witness.

those two persons, to prove that the invoice was not made, nor the letter written in the manner alleged, and that they had not acted as stated. Lord Tenterden rejected the evidence, but the Court (1) of King's Bench granted a new trial, on the ground, that the proffered evidence went to prove a material fact relevant to the issue, and not merely collateral, and that by such evidence a party might contradict his own witness. A partial contradiction thus given to a former witness, has not necessarily the effect of repudiating the whole of his testimony; it would be against all justice, that the whole of a man's testimony should be struck out, because a witness sets him right as to a single fact. (2)

By proof of a contrary statement.

Whether it be competent to a party to prove that a witness, who has been called by him, and has given unfavourable evidence, has been heard at other times to make a statement contrary to that made in Court, is a question on which there exists a difference of opinion. (3) On the one side, it is urged, such evidence would be open to the objections, that the party would thus discredit his own witness by general evidence; that this rule ought to be universal, and that to allow the evidence of a witness to be disproved and contradicted by other witnesses, (which seems at first sight an exception to the rule,) is in truth no exception, but an accidental consequence attendant upon giving evidence relevant to the issue, and the reason given for such practice, shews this to be the correct view,—“such facts, (says Mr. Justice Buller,) are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental, and consequential only.” It is further urged, that there is some danger of collusion and dishonest contrivance, inasmuch as a witness may be induced to make a statement out of

(1) Parke, J., Taunton, J., and Patteson, J.

(2) *Bradley v. Ricards*, 8 Bing. 57, in opposition to a supposed opinion of Lord Ellenborough, in *Alexander v. Gibson*, 2 Campb. 556.

(3) See the case of *Wright v.*

Beckett, 1 M. & R. 414, before Lord Denman and Bolland, B., sitting as judges of the Court of Common Pleas of Lancaster, in which these learned judges differed, and delivered their opinions at length.

Court, for the very purpose of its being reserved, and afterwards used in contradiction to the witness, and that the jury may regard such a statement as substantive evidence in the cause.—On the other side, it may be argued, the evidence is not open to the objection, that the party would thus discredit his own witness by general testimony; that, although a party, who calls a person of bad character as witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavourable to him, by direct proof of general bad character,—yet it is only just that he should be permitted to shew, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to the trial; that this course is necessary, as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence, (being really in the interest of the opposite party,) and afterwards by hostile evidence ruin his cause; that the rule, with the above exception, as to offering contradictory evidence, ought to be the same, whether the witness is called by the one party or the other, and that the danger of the jury's treating the contradictory matter as substantive testimony, is the same in both cases; that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked, that this is a question, in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained, by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences.

A party discrediting his own witness.

On the trial of Warren Hastings, the opinion of the Judges was taken by the Lords, upon a question involving this point, although the circumstances were not such as to raise it distinctly. A witness, named Bean, “professing forgetful-

A party discrediting his own witness.

ness, or speaking indeterminately on a point," (1) was asked by the managers for the Commons, whether he had not been examined before a committee of the House of Commons, and whether he had not before that committee answered the following question in the following manner :—*Q.* "Who was to pay Mehipnarain the allowances stipulated for him by the Governor General?"—*A.* "Doorgbijey Sing." (2) The inquiry being objected to, the opinion of the Judges was required by the Lords, (3) and a question submitted to them, the terms of which are embodied verbatim in the answer delivered by the Lord Chief Baron, (4) expressing their unanimous opinion, "That where a witness, produced and examined in a criminal proceeding by a prosecutor, disclaimed all knowledge of any matter so interrogated, it is not competent for such prosecutor to pursue such examination, by proposing a question containing the particulars of an answer supposed to have been made by such witness before a committee of the House of Commons, or in any other place, and by demanding of him, whether the particulars, so suggested, were not the answers he had so made."

In the case of *Rex v. Oldroyd*, (5) on a trial for murder, the Judge thought it his duty to call, as a witness, the mother of the prisoner, whose name was on the back of the indictment, but who had not been called by the counsel for the prosecution; her evidence tending to an acquittal, the Judge referred to the deposition taken before the coroner, for the purpose of affecting the credit of her testimony; and all the Judges were of opinion, that it was competent to the Judge to do so. The determination of the Judges was confined to the right of the Judge, but Lord Ellenborough and Mansfield, C. J., thought the prosecutor had the same right. (6) It does not appear to have been specially observed, as a ground

(1) Mill's History of British India, Book 6, c. 2.

(2) Jour. Dom. Proc., 29th Feb. 1788.

(3) *Ibid.*

(4) Jour. Dom. Proc., 10th April, 1788.

(5) R. & R., C. C. R. 88.

(6) *Ibid.*

for this decision, that the witness was called by the Judge, and perhaps it may not be too much to infer, that if the same witness had been called by the counsel for the prosecution, the same course would have been allowed.

A party discrediting his own witness.

In the case of *Ewer v. Ambrose*, (1) a witness having been called on the part of the defendant to prove a partnership between himself and the defendant, and having denied that fact, an answer of the witness in Chancery was offered in evidence by the defendant's counsel, and admitted. The Judge left it to the jury to find for the plaintiff, or defendant, according as they gave credit to the witness' answer in Chancery, or in Court. The jury having found for the defendant, the Court of King's Bench directed a new trial, on the ground that the answer was clearly not substantive evidence of the fact, and Mr. Justice Bayley appeared to be of opinion, (though it was unnecessary to decide) that the answer was inadmissible altogether; but upon that point Mr. Justice Holroyd, and Mr. Justice Littleale, abstained from expressing any opinion.

In *Bernasconi v. Fairbrother*, (2) Lord Denman permitted a party to prove, that a witness, immediately before the trial, had made to him a statement quite opposite to what he swore at the trial. In the case of *Wright v. Beckett*, (3) Lord Denman again received similar evidence, and the propriety of that admission was afterwards brought before Lord Denman and Mr. Baron Bolland, sitting as judges of the Court of Common Pleas of Lancaster; the learned Judges having taken time to consider the question, Lord Denman adhered to the opinion before expressed by him, but Mr. Baron Bolland was of opinion, that the evidence was inadmissible; and it was stated by Lord Denman, that "others of great weight and authority agreed with the learned Baron."

The power of cross-examination is generally acknowledged

Cross-examination.

(1) 3 B. & C. 746.

Wright v. Beckett, 1 M. & R. 427.

(2) Cited by Lord Denman, in

(3) *Ibid.*

to afford one of the best securities against incomplete, garbled, or false evidence. Great latitude, therefore, is allowed in the mode of putting questions.* The rule, however, is subject to certain limitations; the questions put must be relevant to the investigation, in which they are offered. The relevancy of a question, as directly bearing upon the matter in issue, has been already considered. (1)

Witness, producing papers and not sworn.

Sworn and examined.

Before entering upon cross-examination, a preliminary question often arises, whether the witness has so far given evidence in chief, as to entitle the opposite party to cross-examine. If a witness is called by a party merely for the purpose of producing a written instrument, belonging to the party, which is to be proved by another witness, he need not be sworn; and if not sworn, he will not be subject to cross-examination. (2) If a witness is sworn, and gives some evidence (as, for instance, to prove an instrument), however formal the proof may be, he is to be considered a witness for all pur-

(1) *Ante*, p. 481.

(2) *Davis v. Dale*, M. & M. 514,
515. *Perry v. Gibson*, 1 Ad. & E.

48. *Summers v. Moseley*, 2 C. & M. 477. *Rush v. Smith*, 1 C. M. & R. 94.

* Sir William Blackstone has referred, in his Commentaries (B. 3, Ch. 23,) to a well-known passage of Quintilian; in which that most judicious of all the ancient rhetoricians gives some excellent hints on the art of cross-examination. "Primum est, nosse testem. Nam timidus terri, stultus decipi, iracundus concitari, ambitiosus inflari potest: prudens vero et constans vel, tanquam inimicus et perversus, dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est: aut aliquo, si continget, urbanè dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non asperere incessere profuit: nam sæpè, qui adversus insecutantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio, aut in causâ est, aut extra causam. In causâ, (sicut accusatori præcipimus,) patronus quoque altius, unde nihil suspecti sit, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueant. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur: et naturali magis acumine aut usu contingit hæc virtus. * * In primis interrogatio debet esse circumspecta; quia multa contra patronos venustè testis sæpe respondet, eique præcipuè vulgo favetur. Tum verbis quam maximè ex medio sumptis: ut qui rogatur (is autem est sæpius et imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. v. c. 7.

poses; and this, although he may be substantially the real party in the suit, and the party on the record a mere nominal party. (1) But where a witness has been asked only one immaterial question, and his evidence is stopped by the Judge, the other party has no right to cross-examine him. (2) If he is sworn, and would be competent to give evidence for the party calling him, the other party will in strictness be entitled to cross-examine him, though he has not been examined in chief; (3) but not if he was sworn by mistake. (4)

Sworn, and not examined.

The rules of evidence, excluding irrelevant matter, have been frequently censured, as excluding also inquiries calculated to discover truth. A practical experience, however slight, of Courts of Justice, affords the best refutation of this objection. It is certainly desirable to know every thing respecting a witness, that can influence the jury as to the degree of credit to which he is entitled; but it would be purchasing this advantage at too high a price, if a number of collateral issues were permitted,—the consequence of which might be, that a mass of evidence would be accumulated, which the most practised judicial mind would be unable to analyze, and which, when presented to men taken from the ordinary occupations of life, as jurymen, would serve only to confuse their attention, and distract it from the true points to be determined. There are other objections also to the trial of such collateral issues, which, though not so conclusive as that

Relevancy, as discrediting the witness.

(1) *Morgan v. Bridges*, 2 Starkie, N. P. C. 314.

(2) *Creevy v. Carr*, 7 C. & P. 64.

(3) *Rex v. Brooke*, 2 Starkie, N. P. C. 473. *Philips v. Eamer*, 1 Esp. N. P. C. 357. In *Simpson v. Smith* and another, (an action for maliciously, and without probable cause, making a charge of felony before a justice, against the plaintiff, and causing him to be apprehended, tried at Nott. Sum. Ass. 1822, before Holroyd, J.) the plaintiff's counsel having called upon the justice to produce the information taken by him, which was

accordingly produced, was proceeding to prove the information by the justice's clerk; when it was insisted by the defendant's counsel, that he should be allowed to cross-examine the justice, who had produced the information; but Holroyd, J., held, that this could not be done, and that the plaintiff's counsel might proceed to prove the information in the regular manner.

(4) *Clifford v. Hunter*, 3 C. & P. 16. *Rush v. Smith*, 1 C. M. & R. 94.

Relevancy as
discrediting the
witness.

above adverted to, are still of some weight. If such issues were permitted, judicial investigations would be interminable; the expense might be enormous; and the character of persons, called as witnesses, might be unjustly assailed by evidence, which they would not be prepared to repel.

Conduct of
witness.

It is settled, that a witness cannot be cross-examined as to any fact,—which, if admitted, would be collateral, and wholly irrelevant to the matter in issue,—for the purpose of contradicting him by other evidence, in case he should deny the fact, and in this manner to discredit his testimony. (1) And if the witness answer such an irrelevant question, before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. (2) To inquire of a witness, in cross-examination, whether he had not attempted to dissuade another witness, examined on the opposite side, from being present at the trial, has been held to be so far immaterial to the issue, that if the witness answer in the negative (namely, that he never made such an attempt), evidence, to contradict him on that point, would not be admissible. (3) However that may be, it is not irrelevant, on the trial of a prisoner, to cross-examine the witness to this fact, whether, in consequence of being charged with robbing the prisoner, he had not said, that he would be revenged upon him; and, if the witness should deny having used such a threat, evidence may be given to contradict him. (4).

In the case of *Thomas v. David*, (5) in an action brought on a promissory note, the execution of which by the defendant was disputed, a female servant of the plaintiff, who, on the face of the note, appeared to be the attesting witness to

(1) *Spencely v. De Willot*, 7 East, 108.

(2) *Harris v. Tippet*, 2 Campb. 638, before Lawrence, J.

(3) *Harris v. Tippet*, 2 Campb. 637, by Lawrence, J. On the trial of Lord Stafford, proof was admitted, on the part of the prisoner,

that Dugdale, one of the witnesses for the prosecution, had endeavoured to suborn witnesses to give false evidence against the prisoner. 7 Howell, St. Tr. 1400.

(4) *Yewin's case*, 2 Campb. 638, n. before Lawrence, J.

(5) 7 C. & P. 350.

the defendant's signature, was called as a witness for the plaintiff; being asked in cross-examination, whether she did not constantly sleep in the same bed with him, she denied the fact. It being then proposed to call a witness to contradict her, the counsel on the other side objected, that the effect of such evidence would be only to contradict the witness on a collateral point; but Coleridge, J., is reported to have said, "Is it not material to the issue, whether the principal witness, who comes to support the plaintiff's case, is his kept mistress? If the question had been, whether the witness had walked the streets as a common prostitute, I think that would have been collateral to the issue, and that, if the witness had denied such a charge, she could not have been contradicted; but here the question is, whether the witness had contracted such a relation with the plaintiff, as might induce her the more readily to conspire with him to support a forgery,—just in the same way as if she had been asked, if she was the sister or daughter of the plaintiff, and had denied the fact." The evidence was admitted. (1)

It is reported to have been ruled at *nisi prius*, that if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause; so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. (2) In the case referred to, the witness might possibly have shown a strong bias in favour of the first party that called him, and on this account perhaps a greater scope was granted to the adverse party, than is usually allowed. It may happen, on the other hand, that the plaintiff calls a witness unwillingly, and from mere necessity, knowing him to be favourable to the other side: in such a case to allow the defendant, on calling him up afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage. On the contrary, the Court might perhaps be induced to invest the plaintiff's

Witness, after cross-examination, called by opposite party.

(1) See as to relevancy of contradictory statements, *infra*.

(2) *Dickenson v. Shee*, 4 Esp. N. P. C. 67.

counsel with some of the powers of cross-examination, at the same time that it would probably oblige the defendant's counsel to treat such a witness strictly as his own, and confine him within the limits of an examination in chief.

Leading in
cross-examina-
tion.

Unwilling
witness.

Willing.

Leading questions are admitted in the cross-examination of a witness, where much larger powers are given to counsel than in the original examination. Witnesses, upon the cross-examination, may be led immediately to the point, on which their answers are required. (1) If they betray a zeal against the cross-examining party, or show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions. There can be no danger in leading too much, where the witness is obstinately determined not to follow. On the other hand, instances frequently occur, where the witness is adverse to the party who calls him, and leans strongly to the other side: here there must be, in reason and justice, some restrictions as to the form and manner of cross-examining. It often happens, that a witness in cross-examination waits only for a hint, to shape a favourable answer, and is in effect the witness of the cross-examining party, though technically called the witness of the opposite side. To put strong leading questions to such a witness without limitation or reserve is substantially preparing a statement for him, and appears to be inconsistent with justice and a fair trial.

An instance, of the kind here described, occurred on the trial of Hardy for high treason. (2) A witness, who was a member of the same corresponding society as the prisoner, having been examined on the part of the prosecution, and having made, on his cross-examination, a favourable representation of the political opinions and designs of the society, was asked, whether some of the members had not used certain expressions on the subject of petitioning; upon which, the

(1) See Hardy's case, 24 Howell's St. Tr. 755, by Buller, J.

(2) 24 Howell's St. Tr. 659.

Lord Chief Justice Eyre reminded the counsel, that he could not put the very words into the witness's mouth; that this was contrary to the practice of his Court and to his opinion. And on the following day, (1) when the subject occurred again, Mr. Justice Buller referred to the rule laid down by the Chief Justice, as the correct rule of practice; and added, "You may lead a witness upon a cross-examination, to bring him directly to the point as to the answer; but not to go the length, as was attempted yesterday, of putting into the witness's mouth the very words, which he is to echo back again." In a recent case, (2) an objection being made to leading a willing witness, Mr. Baron Alderson is reported to have said, "I apprehend, you may put a leading question to an unwilling witness on the examination in chief, at the discretion of the Judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not."

The privilege of witnesses, in not being compellable to answer certain questions, is a question of continual occurrence, and of some importance. The cases here considered, are those, in which the witness might by answering subject himself to a penalty, criminal prosecution, to civil process, or any kind of forfeiture; and lastly, when the question put to him is degrading to his character. The privilege, of refusing to answer, is the privilege of the witness, not of the party, and on that ground, Lord Tenterden (3) refused to allow the counsel of a party, who called the witness, to support by argument this privilege claimed by him. The same learned Judge ruled, that if the witness waived the objection, so far as partially to answer questions tending to subject him to an indictment, he could not shelter himself under the privilege, but is bound to give the whole truth. (4)

Privilege of witness in not answering.

First, a witness cannot be compelled to answer any question, which has a tendency to expose him to a penalty, or to any

1. Where the answer might subject to penalties, &c.

(1) 24 Howell's St. Tr. 755.

(3) *East v. Chapman*, M. & M. 47.

(2) *Parkin v. Moon*, 7 C. & P. 408.

(4) By Lord Tenterden, *Thomas v. Newton*, *id.* 48, n.

kind of punishment, or to a criminal charge. (1) On an indictment for a rape, the woman is not obliged to answer, whether on some former occasion she had not a criminal connection with other men, or with particular individuals; (2) nor is evidence of such criminal intercourse admissible. (3) On an appeal against an order of bastardy, a person cannot be compelled to acknowledge himself the father of a bastard child; but there is no objection to his being sworn, and, if he chooses, he may confess the fact. (4) In an action for a libel, which was published by the defendant in a voluntary affidavit, sworn extrajudicially before a magistrate, it has been held, that the magistrate's clerk is not bound to answer, whether he wrote the affidavit, and delivered it to the magistrate; because, it is said, the bare copying out of a libel is criminal. (5) An accomplice, who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected from a prosecution for such offences. (6)

2. Where the answer might subject to a civil suit.

Secondly, as to the case, where the witness by answering might subject himself to a civil action, or charge himself with a debt. Considerable doubts have been entertained upon this point; some Judges being of opinion, that he is not compellable

(1) Sir J. Friend's case, 4 St. Tr. 6, S.C. 10 Howell's St. Tr. 1090. Lord Macclesfield's case, 6 St. Tr. 649, S. C. 16 Howell's St. Tr. 1149. *Rex v. Lord G. Gordon*, 2 Doug. 593. *Title v. Grevet*, 2 Lord Raym. 1088. 16 Ves. Jun. 242. *Hardy's case*, 24 Howell's St. Tr. 720. *Trial of De Berenger and others*, by Gurney, p. 195. *Cates v. Hardacre*, 3 Taunt. 424. *Parkhurst v. Lowten*, 2 Swanst. Ch. R. 216. See also 16 C. 2, s. 1, c. 12, s. 4, and Preamb. of st. 46 G. 3, c. 37. Acts of indemnity to witnesses are often passed, to absolve them from penalties and prosecutions, on account of transac-

tions of which they are required to give evidence; such as st. 45 G. 3, c. 126, in the impeachment of Lord Melville; and st. 1, 2 G. 4, c. 21, on the inquiry respecting elections at Grampound.

(2) *Hodgson's case*, 1 Russ. & Ry. Cr. C. 211. *Dodd v. Norris*, 3 Campb. 519.

(3) *Hodgson's case*, 1 Russ. & Ry. Cr. C. 211.

(4) *Rex v. St. Mary's, Nottingham*, 13 East, 58, n.

(5) *Maloney v. Bartley*, before Wood, B., 3 Campb. 210. A bill of exceptions was tendered, but afterwards dropped.

(6) *West's case*, *supra*, p. 38, n.

to answer such questions, and others being of a contrary opinion.* To settle the rule of law on this subject, the stat. 46 G. 3, c. 37, was introduced, which declares, that a witness cannot legally refuse to answer a question, relevant to the matter in issue (the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever), on the ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit.

The right, which the parties to a suit have, to refuse answering any question, is not in any degree affected by this statute; and therefore on a question of settlement, a rated parishioner is not compellable by the adverse parish to give evidence, as he is

* This subject was much discussed, in the course of the impeachment against Lord Melville, and referred to the Judges for their opinion. The only report, which the author has seen, of these proceedings, is that to be found in the sixth volume of the Parliamentary Debates; from which the following brief account is extracted. A bill had been brought into the House of Lords, to indemnify witnesses from criminal prosecutions and from civil process, to which they might be exposed by giving evidence. The indemnity from criminal prosecutions was agreed to; but some doubts arising with respect to the indemnification from civil process, several questions were referred to the Judges, with the view of ascertaining, whether persons were legally justified in refusing to answer questions, the result of which might subject them to a civil suit. (6 vol. Parl. Deb. p. 167.) Three questions were proposed; the object of the first and second was to ascertain, whether a witness could demur to answer a question, the result of which might render him liable to an action for debt, or to a suit for the recovery of the profits of public money; the object of the third was to ascertain, whether a witness, who, on making a full and fair disclosure, was to be excused from certain debts, could be legally objected to, on the ground of his being interested. (P. 222.) The Lord Chief Justice Mansfield, who delivered the opinion of the judges, stated, that upon the two first questions they were divided in opinion; and that on third question they were unanimously of opinion, that a witness, in the situation described, could not be rejected on the ground of interest, since whatever might be offered, on condition of his making a fair and full disclosure, could legally make no difference with respect to his evidence, the witness being bound by his oath, by law, morality and honour, to declare the truth, the whole truth, and nothing but the truth. (P. 223.) The House of Lords then called upon the Judges to deliver their opinions *seriatim* on the proposed questions. (P. 226, 227.) The Judges accordingly delivered their opinions in order. Four of the Judges (Lord Chief Justice Mansfield, Grose, J., Rooke, J., and Thomson, J.) were of opinion, that a witness was not compellable to answer any question, the answer to which might subject him to a civil action: the other Judges, together with the Lord Chancellor, and Lord Eldon, were of the contrary opinion. (P. 234, 245.)

directly interested as party to the appeal, and does not come within the words or meaning of the act. (1)

3. Where the answer might subject to forfeiture.

Thirdly, a witness is privileged from answering any question, the answer to which might subject him to a forfeiture of his estate. The declaratory statute, above referred to, implies, that a witness may legally refuse to answer a question, which has a tendency to expose him to a forfeiture of any nature whatsoever. At the time of passing that act, when the general privileges of witnesses were much discussed, it was proposed to insert in the act a proviso, that no mortgagee, or *bond fide* purchaser, or possessor of an estate, should be compelled to answer any question, the answering of which might probably tend to defeat his title, or incur a forfeiture of his estate. This proviso was afterwards withdrawn. However, several of the Judges, who on that occasion were of opinion, that the liability to a civil action or to a pecuniary charge ought not to exempt a witness from answering questions, yet considered the probability or danger of incurring a forfeiture of estate to be a legal ground of exemption. And it is an established principle in Courts of Equity, that a party is not bound to answer, so as to subject himself to pains or penalties, or to any kind of punishment, or to any forfeiture of interest. (2)

4. Where the answer might degrade the witness's character.

The last case, to be mentioned on this subject, is, where a question is asked, the answer to which has a direct tendency to degrade the witness's character, though it may not subject him to a criminal prosecution. If a witness, for instance, were to be asked, whether he had not suffered some infamous punishment, or if any other question of the same kind were asked, imputing guilt to the witness in some past transaction, and not relevant to the matters in issue, would he be compellable to answer? The inquiry here made, it is to be observed, relates only to such questions as are not relevant to the matters in issue; for if the

(1) *Rex v. Inhabitants of Woburn*, 10 East, 395. See 54 G. 3, c. 170, stated *supra*, p. 72, 128.

(2) The cases upon this subject are collected in Mitford's *Treat. on Chanc. Pleadings*, p. 157—163.

transaction, to which the witness is interrogated, form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character.

The privilege, in all the other cases above considered, may be defended on the ground, that the humanity of the English law refuses to compel any man to criminate himself, or to give information, which, though it could not be used against him in evidence, yet might lead to the obtaining of proofs in support of a criminal charge. If this were the only ground, the question so long agitated, whether a witness is bound to answer questions tending to degrade him, but not subjecting him to any legal forfeiture, would fall to the ground, as this principle would manifestly not warrant any protection, where character only, and not personal safety, is concerned. In order, therefore, to justify the privilege in this class of cases, some other reasons must be found.

There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination maintain, that, as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining, what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary; and that if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered.—Those, on the other side, who maintain, that a witness is not compellable to answer such questions, argue to the following effect. They say, the obligation to give evidence arises from the oath, which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these—whether the witness has been in gaol for felony or suffered some infamous punishment,

General reasoning.

or the like,—cannot form any part of the issue, as appears evident from this consideration, that the party, against whom the witness is called, would not be allowed to prove such particular facts by other witnesses. They argue, further, that it would be an extreme grievance to a witness, to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report, when, perhaps, by his subsequent conduct, he may have recovered the good opinion of the world: that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to a forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question to the disparagement and forfeiture of his character: that in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to be questioned, in their cross-examination, as to other offences, in which they have not been concerned with the prisoner: (1) that with respect to other witnesses, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time allowing the witness to shelter himself under his privilege of refusing to answer, and, if he refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal.

Authorities.

Although there appears not to be any express decision on the point, whether a witness is compellable to answer questions degrading to his character, yet several opinions have been pronounced by Judges of great authority, from which it may be collected, that the witness is not compellable to answer such questions. They are as follows:—

(1) See *West's case*, O. B. Sess. after East. T. 1823.

1. In *Cook's* case, reported in the State Trials, (1) where a question arose, whether a juryman, who had been challenged, might be examined as to his having asserted the guilt of the prisoner before the trial, C. J. Treby said, "You may ask upon the *voire dire*, whether he has any interest in the cause, nor shall we deny you liberty to ask, whether he is qualified according to law by having a freehold of sufficient value; but that you may ask a juror (2) or witness every question that will not make him criminous, that is too large. *Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer*; for although their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy, and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty: his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So, persons have been excused from answering, whether they have been committed to bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame, no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable."

Witness not
compellable to
answer.

2. On the trial of Sir John Freind for high treason, (3) a question arose as to the propriety of asking a witness, whether he was a Roman Catholic. The Court determined, that the question could not be asked, as the witness might, by his answer, subject himself to several penalties. C. J. Treby, on that occasion, said, "No man is bound to answer any questions, that will subject him to penalties or to infamy. If you should ask him, whether he were a deer-stealer, or whether he were a vagabond, or any other thing that will subject him to

(1) 4 St. Tr. 748, S. C. 13 Howell's St. Tr. 334. S. C. 1 Salk. 153.

(2) See also Co. Litt. 158, b.

(3) 4 St. Tr. 259, S. C. 11 Howell's St. Tr. 1331. This opinion of

Chief Justice Treby was approved of by Lord Ellenborough, in the case of *Rex v. Lewis*, 1 Esp. N.P.C. 225.

punishment either by statute or by common law, whether he be guilty of a petty larceny, or the like, the law does not oblige him to answer any such questions."

3. In *Laver's* case, (1) on an indictment for high treason, the prisoner insisted, that a witness should be examined on the *voire dire*, whether he had a promise of pardon, or some other reward, for swearing against him. The point was argued by his counsel, and overruled by the Court. The Lord Chief Justice Pratt said, " You see, the most you can make of it is, that it is an objection to his credit; and if it goes to his credit, must he not be sworn, and his credit left to the jury? He must be examined as a legal witness. But *if this man, under expectation or promise of a pardon, comes here to swear that which is not true, and you would ask him to that, he is not obliged to answer it. Nobody is to discredit himself, but always to be taken to be innocent, till it appear otherwise. If they who ask the question, insinuate any thing like that, (namely, that the witness can give no evidence except what is false,) it ought not to have an answer; but if he has a promise of pardon, if he gives true evidence, it is no objection to his being a witness, or to his credit.*" And Mr. Justice Fortescue Aland, referring to a case cited, where a similar point was made and overruled, said, " The reason the Court gave, (that it was improper to ask this question on the *voire dire*,) was, that if he had this promise, such promise was made either to speak the truth, or to speak a falsehood; *if it were to give just and true evidence, there was no harm in it; and if it was a promise of pardon for speaking what was not true, the witness was not bound to answer that question.*"

The question
not illegal.

Whether questions, of such a description, may not be legally asked, is a very different point from that before considered, whether the witness is compellable to answer. It may be just to allow a witness the privilege of not answering in certain cases; but that the party, against whom the witness appears, shall not be allowed to ask the question, and force him to his

(1) 6 St. Tr. 259, S. C. 16 Howell's St. Tr. 161.

privilege, is a proposition, which, if carried into practice, might often be attended with dangerous consequences. There are two *nisi prius* decisions, in which it seems to have been held, that a question, the object of which is to degrade the witness's character, cannot be properly asked.* However, there are many other cases, in which questions of this description have been allowed by the Court. (1) The opinion of Chief Justice

(1) In the case of *Rex v. Edwards*, 4 T. R. 440, on an application to bail a prisoner, the Court allowed the counsel to ask one of the bail, whether he had stood in

the pillory for perjury; the question was objected to, but the objection was overruled. In *Watson's* case, for high treason, questions of this description were fre-

* *Rex v. Lewis*, 4 Esp. N. P. C. 225. *Macbride v. Macbride*, *ib.* 242.—The case of *Rex v. Lewis* was a prosecution for an assault. The report states, that the prosecutor, *who was a common informer, and a man of a suspicious character*, was asked, in the course of the cross-examination, *whether he had not been in a house of correction*; Lord Ellenborough, it is said, *interposed, and stated that this question should not be asked*. The Chief Justice in support of this opinion, referred to the rule laid down by Chief Justice Treby, before mentioned, that a witness is not bound to answer any question, the object of which is to degrade or render him infamous; and added, that he thought the rule ought to be adhered to. Now, it seems probable, from the reasoning of Lord Ellenborough, and from the former part of the report, stating, that the witness was a common informer and of a suspicious character, (which shows, that questions, reflecting upon his character, had been already asked without objection, and had been also answered,) it seems highly probable from these circumstances, that the witness, on being questioned as to the particular fact of his having been in a house of correction, either appealed to the Court for protection, or showed an unwillingness to answer; and if, after this, the question had been repeated, it might be thought necessary to interpose, and intimate, that the witness could not be compelled to answer, and that the question, therefore, ought not to be pressed; this shows the application of the rule, which Lord Ellenborough cited as having been laid down by Chief Justice Treby, as to the privilege of the witness in not answering, which would have been cited prematurely, if the single point in discussion were, whether the question could in the first instance be legally asked. The observation here made, will, perhaps, have more weight, when it is remembered, that Lord Ellenborough continually permitted such questions to be asked without the slightest disapprobation, a fact well known to all who are acquainted with the practice of that great master of the law of evidence.—*Macbride v. Macbride*, was an action of assumpsit; a woman having given evidence of the plaintiff's demand, was asked on the cross-examination, whether she did not live in a state of concubinage with the plaintiff, when Lord Alvanley interposed, and is reported to have said, he thought questions as to the general conduct might be asked, but not such as went immediately to degrade the witness. On the trial of *O'Coigley* and *O'Connor*, a question was asked in cross-examination, which threw imputation on the witness, and the counsel was not allowed to repeat the question or follow it up by another; but here the witness had first appealed to the Court for protection. (26 *Howell's St. Tr.* 1353.)

Treby, and the other Judges, before cited, upon the point, whether the witness is compellable to answer, imply, that there is no objection, in point of law, to the asking the question ; but that the objection arises in a later stage of the cross-examination, namely, when an attempt is made to compel him to answer. They are as strong authorities for the one position as for the other. The same observation may be made also with respect to the statute before referred to ; which seems to imply, that there is no legal objection to a question, which may even subject the witness to forfeiture, although, if the question is asked, he may legally refuse to answer. (1) In addition to this, it may be observed, the common practice of courts of justice, before the most approved Judges, will abundantly furnish instances of such questions being asked, and not being disallowed as contrary to the rules of law : and it is difficult to see, how a question can properly be deemed

quently asked ; and it may be inferred from the opinions of the Judges, on an argument in that case, that such questions are regular. See Gurney's Report of Watson's Trial, 288—291. An instance occurred also in Lord Cockrane's trial, p. 419, by Gurney ; and in Hardy's case, 24 Howell's St. Tr. 726. See also 11 East, 311. Harris v. Tippet, cited by Abbot, J. 2 Stark. N. P. C. 155. 2 Campb. 638, S. C. The following case occurred at the sittings in K. B. after Hil. Term, 1818. In the case of Frost v. Holloway, Mr. Scarlet, in cross-examining a witness, asked him, whether he had not been tried for theft at Reading. The witness refused to answer, and appealed to Lord Ellenborough, whether he was bound to answer such a question. Lord Ellenborough said, "If you do not answer the question, I will commit you ;" adding, "you shall not be compelled to say, whether you were guilty or not." MS. note communicated by Mr. Gurney, who was counsel in the cause. In the case of Cundell v. Pratt, M. & M. 108, a witness was asked, on cross-examination, whether she was not cohabiting in a state of incest with a person named, but Best,

C. J., interposed, and stopped the question. The report states, it was contended that counsel "had a right to put questions tending to degrade witnesses, for the purpose of trying their character," on which the Chief Justice said, he did not forbid the question on that ground, but as a protection to a witness from giving an answer, which might expose him to punishment, adding, "if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer." In the case of Roberts v. Allatt, M. & M. 192, a witness objected to state, whether the transaction, to which he was a party, and in respect of which a bill of exchange (the subject of the suit), was given, was not a settlement of a balance of stock-jobbing time bargains, on the ground, that his answer might subject him to penalties ; but it appearing, that the time for the suing for the penalties was passed, and no proceeding had been commenced against the witness, Lord Tenterden held, that he was bound to answer. And see Rex v. Reading, 7 How. St. Tr. 296. Rex v. Earl of Shaftesbury, 8 How. St. Tr. 817.

(1) 46 G. 3, c. 37.

illegal, when, if the witness chooses to answer, his answer must undoubtedly be received as evidence.

Assuming, that a question is not irregular, merely from its tendency to degrade the witness's character, and that the witness is not compellable to answer, yet, if he chooses to give an answer, the party, who asks the question, will be bound by his answer, and cannot be allowed to falsify it by evidence. "You may ask the witness," said Lord Ellenborough in *Watson's* case, (1) "whether he has been guilty of such a crime (improperly asking him in a degree, because you are calling upon him, upon the sanction of his oath, to answer that which he is not bound to answer, for no man is bound to criminate himself); but if from a desire to exculpate himself from the imputation of crime, he gives an answer, it has been held by many of our Judges, and I never knew it ruled to the contrary, that, having put such question, you must be bound by the answer. The Court is not a court to try a collateral question of crime, and it would be unjust if it were; for how can the party be prepared with a case of exculpation, or with an answer to any evidence which may be produced to charge him? there is no possibility of a fair and competent trial upon that subject, and, therefore, in no instance is it done."

Answer, if made, conclusive.

There are several other ways of impeaching the credit of a witness.

Credit of witnesses impeached.

First, The party, against whom a witness is called, may disprove the facts stated by him, or may examine other witnesses as to his general character. To impeach the credit of a witness, says Mr. Justice Buller, (2) you can only examine to his general character, and not to particular facts; and the reason

1. Proof of general character.

(1) Gurney's Rep. 2 vol. 288. 32 Howell, St. Tr. 490, S. C.

(2) Bull. N. P. 296. See also Rookwood's case, 4 St. Tr. 693. S. C. 13 Howell's St. Tr. 210. Laver's case, 6 St. Tr. 298, 316. S. C. 16 Howell's St. Tr. 246, 284. De La Motte's case, 21 Howell's St. Tr. 811. In some instances, in the

State Trials, evidence of particular facts appears to have been admitted; as in Lord Castlemain's case, 7 Howell's St. Tr. 1102, 1110. Cranburn's case, 13 Howell's St. Tr. 261, and Harrison's case, 12 Howell's St. Tr. 862; but no objection was made to the evidence, in those cases.

Collateral
facts.

given is, that every man may be supposed capable of supporting his general character, but it is not likely he should be prepared to answer to particular facts, without notice; and unless his general character and behaviour are in issue, he has no notice. If a witness, for example, on being questioned, whether he has not been guilty of a felony or of some infamous offence, deny the charge, the party, against whom the witness has been called, will not be allowed to prove the truth of the charge: (1) such evidence is not admissible, either for the purpose of contradicting, or of discrediting him.

This principle has been established by many cases of great authority. In the case of *Rookwood*, who was tried for high treason, (2) the point was considered as too clear for argument:—"Look ye," said Lord Chief Justice Holt, "you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think, that we will try, at this time, whether he be guilty of robbery." And on the trial of *Layer* for high treason, (3) Lord North and Grey being called, on behalf of the prisoner, to give a report of the character, which one of the witnesses for the prosecution had given of himself much to his disadvantage, the Lord Chief Justice Pratt said to the prisoner's counsel, "You know what the rule of practice and evidence is, when objections are made to the credit and reputation of the witness; you cannot charge him with particular offences: for if that were to be allowed, it would be impossible for a man to defend himself. You are not to examine to particular facts, to charge the reputation of any witness; but you are to ask, in general, what is his character and reputation." And in summing up the case to the jury, the Chief Justice said, "The reason, why particular facts are not to be given in evidence, to impeach the character of the witness, is, that if it were permitted, it would be impossible

(1) *Rookwood's case*, and *Layer's case*, cited (4) *supra*. *Rex v. Watson*, 2 Starkie, N. P. C. 149. 32 Howell's St. Tr. 490. S. C. Sharpe v. Scoging, Holt, N. P. C. 541. The same rule is observed in the Courts of Justice in Scotland; see

Burnet's Treatise of Crim. Law of Scotland, p. 397.

(2) 4 St. Tr. 693. S. C. 13 Howell's St. Tr. 211.

(3) 6 St. Tr. 298, 316, S. C. 16 Howell's St. Tr. 246, 286.

for that witness, having no notice of what will be sworn against him, to come prepared to give an answer to it ; and thus the characters of witnesses might be vilified, without having any opportunity of being vindicated." The point was much discussed in the late trial of *Watson* for high treason ; and the principle, above laid down, which had been settled so long before, was again recognised and fully confirmed. (1)

The regular mode of examining into general character is to inquire of the witnesses, whether they have the means of knowing the former witness's general character, and whether, from such knowledge, they would believe him on his oath. (2) In answer to such evidence against character, the other party may cross-examine those witnesses, as to their means of knowledge, and the grounds of their opinion ; or may attack their general character, and by fresh evidence support the character of his own witness.

Secondly, The credit of a witness may be impeached, by proof, that he has made statements out of court, on the same subject, contrary to what he swears at the trial. (3) A letter written by him, or a deposition signed by him, may be used as evidence to contradict his testimony ; the letter, or deposition, being first regularly proved. An examined copy of an answer in Chancery is sufficient proof of the answer, for the purpose of contradicting a witness. (4) A conviction before a magistrate, purporting to set out the deposition of a witness, is not admissible, as proof of such deposition. (5)

The verbal declarations or statements of a witness, made on some former occasion to a third person, are frequently given in evidence, by the party against whom the witness appears, with the view of showing, that his several accounts of the particular

(1) Vol. ii. p. 288, Gurney's Rep. 32 Howell's St. Tr. 490, 492. S. C.

(2) Rookwood's case, 4 St. Tr. 693. S. C. 13 Howell's St. Tr. 210. *Mawson v. Hartsink*, 4 Esp. N. P. C. 102.

(3) *De Saily v. Morgan*, 2 Esp.

N. P. C. 691. *Christian v. Coombe*, 2 Esp. N. P. C. 489.

(4) *Ewer v. Ambrose and another*, 4 B. & Cr. 25.

(5) *Rex v. Howe*, 6 Esp. N. P. C. 125. 1 Camp. 461, S. C.

Cross-examination as to verbal statements of the witness.

transaction, on which he has been examined, are inconsistent and contradictory. This evidence of contradictory statements is produced, for the purpose of exciting doubt and distrust against his testimony, as to the particular transaction on which the discrepancy arises, or, perhaps, to raise suspicion as to the truth of his testimony in general.* Before such evidence can be regularly admitted on behalf of the party, it will be necessary, in the first instance, to prepare the way for its admission, by cross-examining the witness as to the supposed contradictory statements, which are afterward to be brought forward against him. This course of proceeding is indispensable, from a principle of justice due to the witness; for as the direct tendency of the evidence is to impeach his veracity, by contrasting his present statement with that supposed to have been made by him to some other person, common justice requires, that, before his credit is attacked, he should have an opportunity of declaring, whether he ever made such statement to that person, and of explaining, in the re-examination, the nature and particulars of the conversation, under what circumstances it was made, from what motives, and with what design. The former account, given by him in conversation, may have been only partially heard, or misunderstood, or partly forgotten, or intentionally misrepresented; and where the variance between his present statement upon oath, and the former statement, as reported by a third person, may be as much owing to the mistake of the one witness as to the misrepresentation of the other, it will be necessary, that the memory and credit of both witnesses should be fairly tried and contrasted; and, with this view, not only the particulars of the conversation, on which it is intended to contradict the witness, should be distinctly sug-

* According to the practice of the Courts in Scotland, the credit of a witness cannot be impeached by proof of his having given a different account of the matter on a former occasion. The witness may, if he chooses, call for his declaration, (or deposition, if he has been sworn,) and have it cancelled in his presence, before his examination begins, that he may be free, and unfettered, in giving his evidence on the trial. And, if the declaration should not have been cancelled, it cannot be used in any manner to the prejudice of the witness. See Hume's Com. on the Crim. Law of Scotland, vol. ii. p. 367; and Burnett's Treatise on the same subject, p. 467.

gested to the witness, before any contradiction is attempted, (1) but he must be asked as to the time, place, and person involved in the supposed contradiction. (2) In a case, where (3) a witness was asked as to a statement, which he neither admitted, nor denied, Parke, B., held that evidence of the statement was admissible. "Evidence," said the learned Judge, "of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but only such statements as are relevant are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, (and, as I conceive, for that purpose only,) the witness may be asked, whether he ever said what is suggested to him, with the name of the person to whom, or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion." If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving further evidence of it; but if he says he does not recollect, that is not an admission, (4) and you may give evidence on the other side, to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember." (5)

Whether witness must deny statement imputed to him.

Thus it appears, that a witness ought regularly to be cross-examined as to contradictory statements, supposed to have been made by him on a former occasion, before such contra-

(1) See the opinion of the Judges, in the course of the proceedings in the House of Lords, on the bill of pains and penalties; p. 575, of the printed evidence. Some of the preceding remarks have been suggested by that opinion. The opinions of the Judges, on the several points, which arose during these proceedings, are reported also in 2 Brod. & Bing. p. 286, 315.

(2) By Tindal, C. J. in *Angus*

v. Smith, M. & M. 475.

(3) *Crowley v. Page*, 7 C. & P. 791, 1837.

(4) *R. contra*, by Tindal, C. J., in *Pain v. Beeston*, 1 M. & R. 20, 1830.

(5) The evidence was withdrawn. As to examining witnesses in criminal cases as to other statements made by them before the magistrate, see the rules of the Judges, *ante*, 844.

dictory statements can be admitted in evidence, to impeach the credit of his testimony. And this rule has been extended not only to such contradictory statements, but also to other declarations of the witness, and to acts done by him through the medium of declarations or words. So that, if it is intended to offer evidence of former declarations of the witness, or of acts done by him, though not with a view to contradict his statement upon oath in the examination in chief, but with the view of discrediting him as a corrupt witness, or as one who would corrupt other witnesses; in this case also, it has been determined, that the witness should be previously questioned as to such declarations or such acts, on the cross-examination. This appears from an answer of the Judges to a question put to them by the House of Lords, in the course of the proceedings before referred to. (1) The question was in the following words: "Whether, if a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination, as to any declarations made by him, or as to acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it would be competent to the party accused to examine witnesses in his defence, for the purpose of proving such declarations or acts, without first calling back the witness to be examined or cross-examined, as to the fact, whether he ever made such declarations, or did such acts?" Another question was the following: "If a witness, called on the part of a plaintiff or prosecutor, gives evidence against the defendant, and if, after the cross-examination of the witness by the defendant's counsel, they discover, that the witness, so examined, has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause; whether the defendant's counsel may not be permitted to give evidence of such corrupt act of the witness, without calling him back?" The Judges were of opinion, on both questions, that the proposed proof could not be adduced without a previous cross-examination of the witness as to the subject-matter. "The general rule," said the Lord Chief Justice, "and the general practice, is this: if it be intended to bring the credit of a witness into question, by proof

(1) Page 905, of the printed minutes of evidence.

of any thing that he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved."

The rules of cross-examination as to contradictory written statements, supposed to have been made by the witness, were much discussed in the same proceedings, in the House of Lords. On one occasion, in the course of those proceedings, (1) a letter was shown to a witness on cross-examination, and, on being questioned as to the hand-writing, she affirmed, that she could not say whether it had been written by her. The counsel then proceeded to cross-examine the witness, as to her having written certain particulars in a correspondence with her sister. This mode of cross-examination was objected to; on which occasion, the following question was put by the House of Lords to the Judges for their opinion: (2) "Whether a party would be allowed, in cross-examining a witness, to represent, in the statement of a question, the contents of a letter; and then to ask the witness, whether he wrote such a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness, and asked him whether he wrote it, and without his admitting that he wrote the letter?" The Judges were of opinion, that the question must be answered in the negative; and the reason of their opinion was, "That the contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course, therefore, is, to ask the witness, whether that letter is of his hand-writing; if the witness admits it to be his hand-writing, the cross-examining counsel may, at his proper season, read that letter as evidence; and when the letter is produced, then the whole of the letter is made evidence. One of the reasons (continued the Lord Chief Justice) for the rule requiring the production

Cross-examination as to written statements of the witness.

Cross-examining as to contents of a letter.

(1) In the case of the witness Louisa Demont, page 328, 334, of the printed evidence.

(2) Printed evidence, page 334. 2 Brod. & Bing. 286. S. P. See 3 Barn. & Cress. S. P. 749, l. 15.

of written instruments, is, in order that the Court may be possessed of the whole. If the course, here proposed, should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper ; and thus the Court may never be in possession of the whole, though it may happen, that the whole, if produced, may have an effect very different from that which might be produced by the statement of a part." The writing, therefore, if in existence and producible, ought to be produced and shown to the witness. When it is produced, the cross-examining counsel may, if he thinks proper, show the witness only a part, or only one or more lines of the letter, and not the whole of it ; and may ask the witness, whether he wrote such part, or such one or more lines. (1) If the witness does not admit, that he wrote the part shown to him, he cannot be cross-examined as to the contents of the letter, for the reason already given ; namely, that the paper itself ought to be produced, in order that the whole may be seen, and the one part explained by the other. (2) If, on the other hand, the witness should admit, that he wrote the letter, still the rule with respect to cross-examining, as to the contents, is precisely the same : the counsel cannot inquire of the witness whether or not such statements are in the letter ; the letter itself must be read, to show whether it contain such statements. (3) With respect to the proper time for reading the letter, the ordinary rule is, that it shall be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case ; this is the ordinary course ; but if he suggests to the Court, that he wishes to have the letter read immediately, in order to found certain questions upon the contents, which cannot well or effectually be done, without reading the letter itself ; in that case, for the more convenient administration of justice, the letter is permitted to be read at the suggestion of

(1) The opinion of the Judges on the second question in the case of the same witness, page 335, of the printed evidence. 2 Brod. & Bing. 286.

(2) Answer of the Judges to the second part of the second question,

p. 335, of the printed evidence.

(3) Opinion of the Judges, in answer to another question, in the case of the same witness, p. 337, of the printed evidence. 2 Brod. & Bing. 288.

the counsel; still, however, it must be considered as part of the evidence of the cross-examining counsel, and subject to all the consequences of his having it so considered. (1)

The rule, above laid down, for cross-examining a witness as to the contents of a letter or other written paper, is applicable, at the furthest, only to a case in which the writing is supposed to be in existence. This appears to be clear, from considering the opinion of the Judges, and the circumstances out of which the question arose. The letter, written by the witness, was, in that case, actually in the possession of the cross-examining counsel, produced by him, and shown to the witness; the question, referred to the Judges, proceeds upon the supposition of the letter being producible; and the entire reasoning, on which their opinion is founded, expressly refers to the case of an existing paper. They held, in the case proposed, that the counsel could not cross-examine as to the contents of a letter, which was produced and shown to the witness; because "the contents of every written paper are to be proved by the paper itself, and by that alone, if the paper be in existence." But if the paper be not in existence, this reasoning will not apply. If, therefore, a letter, written by the witness, is proved to have been lost or destroyed, (in which case, the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the letter,) then it would be reasonable and proper to allow the counsel to cross-examine the witness as to the contents of such letter. This, indeed, appears to be the only regular mode of proceeding: for, as the credit of the witness may be afterwards impeached by proof of the contents of the lost letter, no less than by the production of an original letter, justice requires, that the witness should first have an opportunity, in his own defence, of entering into a full statement of what he has written; and this statement is not inferior, in its kind, as evidence, to any other secondary proof of the contents, that may be afterwards produced to contradict him. This latter circumstance distinguishes

Cross-examin-
ing as to lost
letter.

(1) Opinion of the Judges, in mentioned question. 2 Brod. & answer to the 2nd part of the last- Bing. 289.

the case from that before mentioned, in which the witness's letter was in the possession of the cross-examining counsel, and that letter, if produced, would have been the best, and, as the Judges held, the only legitimate proof of its contents. It may, perhaps, be suggested, that, since the proof of the loss or destruction of the writing is strictly necessary, before the counsel in such case can cross-examine as to its contents, the introduction of such antecedent proof might occasion great inconvenience, by disturbing the regular progress of the cause, and distracting the attention. But when this inconvenience is likely to be felt in any great degree, it will be always in the power of the Judge, if he shall think proper, either to admit, in the first instance, the witness's statement of the contents of the writing, or to reserve the power of cross-examining as to its contents, until the time has arrived, when the counsel on the opposite side shall enter upon his case.

Cross-examin-
ing as to having
written a differ-
ent statement.

A question, connected with this subject, here naturally occurs; whether counsel may be allowed to cross-examine a witness, as to his having written a letter containing a different statement. This question, it is conceived, in the general form here stated, has not been determined by the resolution of the Judges in the case before-mentioned: for, in that case, the question, put to the witness, related to a variety of particular expressions and entire passages, supposed to be contained in a letter, and the letter, which was supposed to contain such expressions, had been actually produced, and shown by the counsel: whereas, on the contrary, the question, here proposed, is quite general, namely, whether the witness has given any account in his letters, or otherwise, differing from his present statement; and the question is proposed, without any reference to the circumstance, whether the letter is or is not in existence, or whether it has or has not ever been seen by the cross-examining counsel. Nor does the question, here proposed, appear to have been determined by the resolution of the Judges, on a question, which occurred in a later stage of the same proceedings; since, in this latter case also, the question related to particular expressions, supposed to have been contained in the letter, and the opinion of the

Judges seems to have been partly founded on the supposition, that the witness's letter was actually in the possession of the cross-examining counsel, as afterwards distinctly appeared to be the fact.* Since the subject, therefore, seems still open for

* The question, here alluded to, arose in the following manner. (a) The cross-examining counsel asked a witness, named Giuseppe Sacchi, "Whether he had ever represented to any person, after he had left the service of the Princess, that he had taxed himself with ingratitude towards a generous mistress?" On this, the attorney-general submitted, that the question should be put, whether he had so represented himself *in conversation*; for that, if the representation was in writing, the writing itself should be produced, before the question could be put. After an argument upon the point, the following question was put to the Judges: "Whether, according to the established practice in the courts below, counsel in cross-examining are entitled, if the counsel on the other side object to it, to ask a witness, whether he has made representations of a particular nature, not specifying in his question, whether the question refers to representations in writing or in words?"

The Lord Chief Justice, in delivering the opinion of the Judge, (b) observed, that they felt some difficulty in giving a distinct answer to that proposition, as they did not remember an instance of a question having been asked by the cross-examining counsel precisely in those words, and they were not aware of any established practice distinctly referring to such a question. The Lord Chief Justice then adverted to the rule of law respecting the examination of a witness, as to a contract or agreement, in which case, if the counsel on the one side were to put a question generally as to the contract, the ordinary course is for the counsel on the other side to interpose an intermediate question, whether the contract referred to was in writing, and if the contract should appear to have been in writing, then all further inquiry would be stopped, because the writing itself must be produced. With reference to this established rule, they considered the question proposed to them, and were of opinion, that the witness could not properly be asked, on cross-examination, whether he had *written such a thing, the proper course being to put the writing into his hands, and ask him whether it be his writing*; they held also, that if the witness were asked, whether he had *represented such a thing*, they should direct the counsel to ask, whether the representation had been made *in writing*, or by words; and if, in consequence, he should ask, whether it had been made *in writing*, the counsel on the other side would object to the question; but if he should ask, whether the witness had *said* such a thing, the counsel would undoubtedly have a right to put that question.

The counsel were then called in, (c) and were informed that if, on cross-examination, they inquired of a witness, whether he had made representations of any particular nature, stating the nature of those representations, they should, in their inquiry, ask the witness first, "whether he made the representations by parol or in writing?"

The attorney-general of the Queen inquired, whether he might be at liberty to alter his question, and put it thus: Did you ever make any representation in writing concerning your real or supposed ingratitude

(a) Printed evidence, p. 445.

(c) Page 447.

(b) Page 446. 2 Brod. & Bing. 292.

discussion, and may be considered of some importance, as affecting very materially the powers of cross-examination, upon which the right administration of justice so much depends, it will not, perhaps, be thought foreign to the subject, to consider, whether any legal objection can be made to the proposed question. The question is this; Can a witness be properly asked, in the cross-examination, whether he has written any letter giving a different account?

Objection.

The objector to such a question might possibly urge, that, if the account is in writing, the writing ought to be produced, as the best evidence, and that the witness's statement of the contents of the letter is only secondary evidence, which cannot be received: that, upon this principle, a witness cannot be examined as to the contents of a deed, or written contract, or other written instrument, unless the original is lost, or destroyed, or in the possession of the adverse party. Or, lastly, it might be argued, that the witness may not be able to remember some particulars of his letter, especially of a letter written some time before, and may, perhaps, suppose the statement, contained in it, to vary in some respects from the account which he has given in his examination in chief, and to be different, also, from what the letter really was; in which case, the witness may make an inaccurate representation of its contents, to his own disadvantage, and his character may consequently suffer, without any just ground of imputation; whereas, if the letter itself were produced, this difference of statement might be corrected and satisfactorily explained.

Answer.

The argument on the other side, in support of the question, may be supposed to be of the following kind. First, with respect to the principle, urged in support of the objection,

towards so generous a witness as Her Royal Highness?" The counsel were then directed to withdraw, and, on their being recalled, the counsel for the Queen were asked, whether they wished to withdraw the question; upon which the attorney-general of the Queen stated, that he begged to withdraw the question, to save the necessity for further discussion. The examination then proceeded, and letters were put into the witness's hands, which he admitted to be his hand-writing.

(namely, that the letter itself is the best evidence, and therefore that the parol evidence of the witness is not admissible,) although this principle holds almost universally *with reference to the proof of the issue, and of every material part of the issue*, it will be found not to apply to a cross-examination, which is solely intended *to try the witness's credit and veracity*.

A witness, it is admitted, cannot be questioned as to the contents of a written agreement, or other written instrument, wherever the agreement, or writing, is either part of the issue, or material to the issue; because the writing itself is the best proof of its contents; and this being within the knowledge of the parties, (as it must be supposed to be, from its being material to the issue,) the party, who wishes to avail himself of the writing, ought to be provided with the regular proof of its contents; and the circumstance of his not satisfactorily accounting for the non-production of the original instrument, is of itself matter of suspicion. Chief Baron Gilbert, in treating of the general rule, evidently considers it as a rule applicable only *to the proof of the issue, or of some fact material to the issue*. "The true meaning of the rule of law (he says), (1) which requires the greatest evidence, that the nature of the thing is capable of, is this; *that no such evidence shall be brought, which, ex naturâ rei, supposes still greater evidence behind in the party's own possession and power; for such evidence is altogether insufficient, and proves nothing*; for it carries a presumption with it, contrary to the intent, for which it was produced; for, if the other greater evidence did not make against the party, why did he not produce it to the Court? As, if a man offers a copy of a deed or will, *where he ought to produce the original*, this carries a presumption with it, that there is something more in the deed or will, that makes against the party, or else he would have produced it; and therefore the proof of a copy, in this case, is not evidence, and cannot possibly weigh any thing in a court of justice." This reasoning cannot justly be applied to the subject now under discussion; which is merely this, whether the cross-examining coun-

1. Meaning of the rule as to production of the best evidence.

(1) Gilb. Ev. 13.

sel may ask a witness, whether he has written any letter, giving an account different from that which he has given in his examination in chief. For the question here proposed, or the witness's answer (whether his answer be in the affirmative or in the negative,) cannot justly raise any presumption, that the original letter is, at the time of the trial, or ever has been, in the possession or power of the party, against whom the witness appears; and the non-production of the witness's letter cannot justly be imputed to the party as matter of suspicion, when it does not appear, whether any such letter was ever written, or to whom written, or at what time, or under what circumstances. If the witness denies, that he ever wrote a different statement, then the cross-examining counsel cannot impeach his evidence by calling another witness to speak to the contents of the letter, because, in this case, the witness and the party are at issue as to the contents, and the original letter must be produced, or its loss satisfactorily proved, otherwise, it must be presumed, in justice to the witness, that the letter, if produced, would not contradict his testimony. But if, on the other hand, the witness confesses, that he has written a contradictory statement, and cannot satisfactorily explain the contradiction, surely such an admission (being, in some degree, against his own character, and, therefore, against his own interest,) will be quite as satisfactory and convincing, upon this point, as the letter itself could be; and it cannot reasonably be presumed, that the letter, if produced, would corroborate the statement, which the witness made in his examination in chief, when he himself negatives such a supposition by his own confession. The general rule, therefore, that the best evidence is to be produced, which the nature of the thing admits, is to be understood as applying to deeds and agreements, which *form part of the issue*, or which are *material to the issue*—to written notices to quit, in an action of ejectment, on the expiration of a yearly tenancy—to letters written by either *party to the suit*,—and to other instances of a similar kind: in which cases, the non-production of the writing may afford well-grounded suspicion against the party, who would inquire into its contents; but it is submitted, for the reasons before-mentioned, that the

rule cannot apply to the question now under consideration ; and it certainly has not been so applied either by Chief Baron Gilbert or Mr. Justice Buller, who have fully entered into the reason and principle of the general rule.

Again, if the rule is, as argued on the other side, that a witness cannot be questioned, as to some different statement supposed to have been written by him, how is it that a witness may be questioned, on the *voire dire*, as to his taking, under some written agreement, an interest in the event of the suit ; for, as in the former case, the letter would be the best proof of its contents, so, in this case, the written agreement would be the best proof of any interest which the witness may take under it ; yet, it is certain, that such an examination, as to the contents of written instruments, is strictly regular, with a view to discover the *interest* of the witness ; and the reason for this seems to be, because the opposite party may possibly be ignorant of the existence of any such instrument, and may not know, that a particular witness would be called on the other side. (1) For the same reason, precisely, the proposed question, as to the *credit* of the witness, seems to be regular ; because the witness may be a stranger, or, if known, may be unexpected ; and the party, against whom he appears, may be ignorant of the letter, or without the means of procuring it, or may have no reason to suppose, that any such letter could be wanted.

If the argument on the other side can be maintained, it would not be allowable, in cross-examination, to ask an accomplice, or other witness, who appears against a person on a criminal prosecution, whether he has not been himself tried for some offence ; for it might be objected, with as much reason, that the fact of his having been tried for such an offence is partly matter of record, and therefore not to be proved without the re-

(1) If the witness produces the instrument, under which he is supposed to take the interest, the instrument itself ought to be read, as supplying the best proof of the witness's situation, *Butler v. Carver*, 2 Starkie, N. P. C. 434. So, if the

witness were to produce the letter, on which he is cross-examined, the letter itself should be read, as best proving whether its contents are contradictory, or confirmatory of his evidence.

cord, which is the highest species of proof; yet such questions are continually asked, and it has not been the practice to disallow them, merely on the ground, that the witness's answer is not the best evidence of the fact, that can be produced. For these reasons, it may be said, the general rule, respecting the production of the best evidence, appears not to be applicable to the question here considered.

2. Supposed
hardship.

Lastly, with respect to the supposed hardship and unfairness of subjecting a witness to such cross-examination, when he may have forgotten the particulars of his letter, and erroneously may suppose, that it represented the transaction in a manner different from what he has represented it in his evidence, it may be observed, that such a case, if not impossible, is at least not probable; for it is difficult to conceive, that a witness of the weakest understanding could be persuaded to believe, that he has made different statements, when, in fact, his statements have always been the same. But, if such an improbable case should occur, it would not occasion any embarrassment to a witness of character, who has no design to disguise or misrepresent. Whatever observations can fairly be made, on behalf of a witness in such a situation, will be suggested by the court; and the jury will have the means of judging, whether the difference of statement arise from mere mistake, or from an intention to deceive.

Relevancy of
statements.

On the question, what matter is receivable in evidence, what not receivable, for the purpose of contradicting a witness, (by proof of contrary statements made by him,) it is not possible to lay down any precise general rule. The evidence, offered for that purpose, must relate to something, stated by the witness, not wholly irrelevant to the matters in issue. In an action on a policy of insurance, a witness called for the defendants was asked, if he had not said that they "had not a leg to stand on;" which he denied: and Tindal, C. J., ruled, that it was not a matter so directly connected with the issue, as to make a contradiction admissible. (1) Where the question turned on the consi-

(1) *Elton v. Larkins*, 5 C. & P. 390.

deration that passed for discounting the bill, on which the action was brought, it was held by Lord Tenterden, that what a witness said on a former trial between the same parties respecting another bill, which was discounted at the same time, and under the same circumstances, was not collateral matter. (1)

Evidence, elicited by cross-examination, may be properly considered as filling up and completing the evidence given in chief; consequently, it does not give the other party a right of reply. In the application of this rule, it does not appear to make any difference, whether the cross-examination has been confined to points adverted to in the evidence in chief, or been extended to the proof of a substantive new fact. Where, however, the fact is not completely proved by the cross-examination, and, to complete the proof of the fact, a writing or some other additional evidence is necessary, the production of such evidence will manifestly amount to substantive proof offered by the cross-examining party, so as to give a right to reply. It has been before shewn, that when a written paper is produced, and used only to refresh a witness's memory, the party may cross-examine the witness upon it, without putting the paper in evidence, and without exposing himself to a reply from the other side. (2) It has been said, in a case, where a witness was examined as to entries in a book, that the opposite party could not cross-examine as to other entries, which have not been used in the examination in chief, without putting them in as his evidence. (3)

Cross-examination.

Right to reply. (5)

Paper used to refresh memory.

If a party, by cross-examination of a witness, obtains proof of the handwriting of a paper shewn to the witness, the opposite party has no right to see the paper for the purpose of cross-examining the witness, as to the paper being, as alleged, the hand-writing of the plaintiff. (4) By proving a document, on

(1) 3 C. & P. 76.

(2) *Gregory v. Tavernor*, 6 C. & P. 280.

(3) By Gurney, B., *ibid.* *Sed qu.* if the use of the other entries, or other writings, is confined to refreshing the memory of the witness, without intending by them to contradict him, or using them in

any other way as substantive evidence.

(4) By Bosanquet, J., in *Russell v. Rider*, 6 C. & P. 416.

(5) As to the use of depositions for the purpose of contradicting a witness, see the rules of the Judges, *ante*, 844.

the cross-examination of a witness, the party will not be compelled to put it in, before he enters upon his own case, even though he has desired the witness to read it, and has cross-examined him upon it. (1)

Re-examination as to former statements.

As the object of cross-examining a witness, respecting a former statement, supposed to have been made by him, is to impeach the truth and credit of his testimony; so, on the other hand, the object of the re-examination is, to give him an opportunity of showing the consistency of his statements, and of vindicating his character. Upon this subject, it is material to consider, how far the witness may be re-examined as to other parts of the same statement. If that which the witness has stated, in answer to the question on his cross-examination, arose out of the inquiries of the person, with whom he had the conversation, the witness may be asked in the re-examination what those inquiries were. (2) He may also be asked, what induced him to give to that person the account, which he has stated in the cross-examination. (2) The general rule is, that counsel have a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also an explanation of the motive, by which the witness was induced to use those expressions; he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motive of the witness. (2) And as many things may pass in one and the same conversation, relating to the subject of the conversation, which yet do not relate to his motive, or to the meaning of his expressions, the counsel are not entitled to re-examine to such parts of the conversation.

A distinction has been made between a conversation, which a witness may have had with a *party to the suit*, and a conver-

(1) By Alderson, B., in *Holland v Reeves*, 7 C. & P. 36.

(2) See the account of the proceedings in the House of Lords,

above referred to, p. 453, 454, of printed evidence, in the case of the witness Giuseppe Sacchi. 2 Brod. & Bing. 294, S. P.

sation with a *third* person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to any thing that may have been said by an adverse party, the counsel for that party has a right, it has been thought, to lay before the court the whole that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even the matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; on the ground that it would not be just to take part of a conversation, as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. But, it has been said, the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit; it becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; and when once all that had constituted the motive and inducement, and all that may show the meaning of the words and declarations, has been laid before the court, the court becomes possessed of all that can affect the character or credit of the witness, and all beyond this is irrelevant and incompetent.*

* The question proposed to the Judges is not here inserted, because it is at once so abstract and particular, as not to be of much general importance. The reasons, above stated, are selected from the judgment of the Lord Chief Justice. Some difference of opinion occurred on this subject among the Judges. Mr. Justice Best differed in opinion from the other Judges; the Lord Chancellor also, and Lord Redesdale were of a different opinion. Mr. Justice Best held, that each of the proposed questions should be answered in the affirmative. His reasoning appears to have been to the following effect. The rule, which is acknowledged to have been settled with regard to the statements or conversations of a *party to the suit*, applies with equal reason and force to the statements and conversations of a *witness*. As, in the former case, if some part of the conversation, in which the party has been engaged, is brought forward, by the cross-examination, against that party, the whole of the conversation may be properly inquired into, on the re-examination; so, in the latter case also, if one part of the conversation, of a witness has been drawn from him by cross-examination, with the view of

Prince v. Samo:

The reasoning, in the case above referred to, and the grounds of the supposed distinction, were fully considered by the Court of King's Bench in a very recent case; (1) when that Court, upon full consideration of the argument on both sides, overruled the distinction, and adopted the more safe and intelligible principle, that the office of a re-examination is to be confined to showing the true colour and bearing of the matter elicited by cross-examination, and that new facts or new statements, not tending to explain the witness's previous answers, ought not to be admitted. The question arose, in an action for a malicious arrest, upon a debt for money lent by the defendant to the plaintiff, which it was suggested was given to him. The plaintiff called his attorney as a witness; he happened to have been present at the trial of a prosecution instituted by the plaintiff against a witness, for perjury in the action in which he had been arrested. The defendant's counsel inquired of him in cross-examination, whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly, and remanded by the Court. This question was not objected to. On his re-examination the same witness was asked, whether the plaintiff had not also, on that occasion, given an

(1) *Prince v. Samo*, 3 Nev. & P. 140. 7 Ad. & El. S. C.

disparaging his testimony, the whole of what passed in that conversation ought to be admitted on the re-examination. This is justly due to the character of the witness, who, having been attacked on the one side, is entitled, in vindication of his character, to have the entire conversation fairly and fully detailed in evidence: it is due to him also as a protection and security against proceedings, which might otherwise be instituted against him, on statements partially extracted by cross-examination. The witness cannot have a complete opportunity of explaining his motives, unless every part of the conversation may be inquired into; he may, in his cross-examination, have assigned some reason or motive for what he said in one part of the conversation, believing that reason or motive to be the only one, which operated upon his mind; yet, perhaps, if some other part of the conversation should be suggested to him in his re-examination, he may instantly discover, that some other motive also influenced him, or that what he said had been suggested by some other incident, not before adverted to in the former examination. But although the entire conversation ought to be admitted, it is never to be admitted as evidence of any fact that may have been asserted in the course of the conversation, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

account of circumstances out of which the arrest had arisen, and what that account was,—for the purpose of laying before the jury proof that the arrest was without cause, or malicious, of which facts there was scarcely any, if any, evidence whatever. It was objected, that the eliciting of a detached expression of the plaintiff did not make every thing that fell from him at that time evidence in his own favour. Lord Denman was of this opinion, and disallowed the question, on the ground, “that the witness might be asked as to every thing said by the plaintiff, when he appeared on the trial of the indictment, that could, in any way, qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it.” The propriety of this ruling was brought before the Court, on a motion for a new trial. The Court, recognizing the rule above laid down, as to the re-examination of a witness respecting statements made by him, extended the same rule to evidence given by him of statements made by the party calling him, and observed that the doctrine, giving a larger power in the latter case, depended upon the opinion of Lord Tenterden, which, strictly considered, was as to this point, extra-judicially delivered; that it was not in terms adopted by Lord Eldon or any of the other Judges, who concurred in the answer to the proposed question; that it was expressly denied by Lord Redesdale and Wynford, and that it did not rest on any authority. The Court added, “In our opinion the reason of the thing would rather go to exclude the statements of a party making declarations, which cannot be disinterested. Nothing would be more easy than to find, or imagine examples of the extreme injustice, that might result from allowing such statements to be received; but none can be stronger than the actual case. Because the plaintiff was shown to have said that he was insolvent, he would have been allowed, without any reference to his own insolvency, to prove, by his discourse at the same period, every averment in his declaration, with every circumstance likely to excite prejudice and odium against the defendant; and if this were evidence, the jury would be bound to consider, and might give full effect to it, and thus award

large damages for an injury, of which no particle of proof could be given, excepting the plaintiff's own assertion."

Re-examination, as to objectionable evidence in cross-examination.

In general, if a witness on cross-examination voluntarily give inadmissible evidence, it will not be inserted in the Judge's notes, nor can it be treated as evidence in the cause; for an adverse witness cannot obtrude evidence against a party on cross-examination, which he could not give in chief; but if a party choose to cross-examine the witness as to inadmissible facts, the other party is entitled to re-examine him, as to such evidence so given. (1)

Evidence in support of character.

In answer to the evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness, whose veracity has been impeached, it seems reasonable to be allowed to show, that he is a man of strict integrity, and of scrupulous regard to truth.

Former statement, not evidence in support.

Chief Baron Gilbert was of opinion, that the party, who called the witness, might show, that he affirmed the same thing before on other occasions, and that he is still consistent with himself. (2) This, however, has been doubted, and with good reason. Mr. Justice Buller lays it down, that such evidence is clearly not admissible in chief, and it seems doubtful, he adds, whether it is so in reply. (3) And Lord Chief Justice Eyre is represented as having rejected such evidence, even when offered on behalf of a defendant, in a prosecution for perjury.*

(1) *Blewett v. Tregonning*, 3 Ad. & El. 584. 5 N. & M. 308, S. C.

(2) *Gilb. Ev.* 135. See *Lutterel v. Reynell*, 1 Mod. 282, and *Sir J. Friend's case*, 4 St. Tr. 613. 13

Howell's St. Tr. 32, S. C., and *Harrison's case*, 12 *Howell's St. Tr.* 861, where this confirmatory evidence was offered *in chief*; which would not be allowed.

(3) *Bull. N. P.* 294.

* So said by Lord Redesdale, in the Berkeley peerage case, 5th June, 1811. The occasion of the discussion, which took place, was as follows: One of the peers inquired of a witness, who had been cross-examined and re-examined, as to statements made by Lady Berkeley, on a former occasion, respecting her supposed marriage. The Solicitor-general suggested to the committee, whether this was the regular course of proceed-

It may be observed, on this kind of evidence in general, Remark. that a representation without oath can scarcely be considered as any confirmation of a statement upon oath. It is the oath that confirms; and the bare assertion, that requires confirmation. The probability is, that in almost every case the witness, who swears to certain facts at the trial, has been heard to assert the same facts before the trial; and it is not so much in support of his character, that he has given the same account, as it would be to his discredit, that he should ever have made one different. The imputation on his veracity results from the fact of his having contradicted himself, and this is not in the least controverted or explained by the evidence in question. If a witness has made a statement a hundred times in one way, and a hundred times in another way directly contrary, the only inference must be, that he is utterly destitute of all title to credit. In one point of view, a former statement by the witness appears to be admissible, in confirmation of his evidence; and that is, where the counsel on the other side impute a design to misrepresent, from some motive of interest or relationship: in that case, perhaps, in order to repel such an imputation, it might be proper to show, that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts.

If an attesting witness to a will or deed impeach it's validity

Character of
attesting wit-
ness deceased.

ing, and stated what he conceived to be the general rule upon the subject. The admissibility of the former statements was then much discussed. After the arguments of counsel on both sides, Lord Redesdale said, he had always understood, that, for the purpose of impugning the testimony of a witness, his declaration at another time might be inquired into, but not for the purpose of confirming his evidence. And the Lord Chancellor expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause; but considering the house as in some degree standing both in the situation of the counsel for the claimant, and of the counsel against the claimant, he was of opinion, that the question might be properly asked by the house, though it could not be asked by the counsel on one side; but with respect to the answer to the question, it might be the subject of future consideration, whether it ought to stand upon the minutes as evidence. The question respecting the former representations of Lady Berkeley was therefore repeated by one of the Lords, and the answer entered among the minutes, subject to future revision. MS.

on the ground of fraud, and accuse other subscribing witnesses, who are dead, of being accomplices in the fraud, the party, claiming under the instrument, may give evidence of their general good character: for, if living, they might be produced as witnesses, and their character might then be the subject of examination; and, after their death, an opportunity ought to be given, to show what credit is to be attached to their attestation. (1) The only mode left, in such a case, of doing justice to the person impeached, is by inquiring into his general character.

In the common case, where a witness for the plaintiff asserts one thing, and a witness for the defendant asserts another, and direct fraud is not imputed to either, evidence to general character is not admissible. (2)

CHAPTER IV.

OF BILLS OF EXCEPTIONS, AND DEMURRERS TO EVIDENCE.

Bill of excep-
tions.

THE competency of witnesses and the admissibility of evidence are to be decided by the Judge who tries the cause, and from his judgment there is an appeal by a bill of exceptions. An appeal also may be made, in the same manner, from the direction or opinion of the Judge, as to the sufficiency of the evidence to maintain the plaintiff's claim. (3)

At common law, a writ of error could not be brought for any error in law, which did not appear on the record; and there-

(1) Doe dem. *Walker v. Stephenson*, 3 Esp. N. P. C. 284. 4 Esp. N. P. C. 50; cited and approved in 1 Campb. 210. *Provis v. Reed*, 5 Bing. 435. But it seems, that evidence of statements made by a deceased witness, is not admissible, either for the purpose of sup-
porting, or impeaching his character; not even, with respect to the

latter point, if the statement amount to a confession of forgery of the instrument in question. See *Stobart v. Dryden*, 1 M. & W. 615.

(2) *Bishop of Durham v. Beaumont*, 1 Campb. 207.

(3) 1 Black. Rep. 556. *Cowp.* 161. As to the general nature of bills of exceptions, see *Bull. N. P.* 316. *Tidd. Pr.* 311.

fore, where the plaintiff or defendant alleged any thing *ore tenus*, which was over-ruled by the Judge, the party aggrieved had no redress. (1) To remedy this defect, it was enacted by 13 Ed. 1. stat. 13 Ed. 1, ch. 31, "if one impleaded before any of the justices allege an exception, praying that the justices will allow it, that, if they will not, and if he write the exception, and require the justices to put their seals to it, the justices shall do so, and if one will not, another shall."

This statute extends to the plaintiff as well as to the defendant, (2) and to a trial at bar as well as at *nisi prius*. (3) But it has been doubted, whether it extends to criminal cases. Lord Coke, in his exposition of the statute, states, that it extends to all actions, real, personal, and mixed; but of criminal cases he makes no mention. In the case of Sir H. Vane, (4) who was tried for high treason, the Court refused to sign a bill of exceptions, "because," they said, "criminal cases were not within the statute, but only actions between party and party." From this authority Mr. Serjeant Hawkins infers only that a bill of exceptions is not allowable on an indictment for treason or felony. (5) "Whether a bill lies not in any criminal case," said Lord Hardwicke, "is a point not settled." (6) It was allowed in the case of *The King against Lord Paget and others*, on an indictment for a trespass, (7) and also on an information in the nature of a *quo warranto*. (8) But Lord Hardwicke, in the case before referred to, after saying "that he had known a bill of exceptions allowed in informations in the Court of Exchequer, which are civil suits for the king's debt," added, "it has never been determined to lie in mere criminal proceedings in other courts." (9)

Whether in criminal cases.

(1) 2 Inst. 426.

(2) 2 Inst. 427.

(3) *Thurston v. Slatford*, 3 Salk. 155; *Adm. per cur.* in *Duchess of Grafton v. Holt*, Skin. 354. *Rewe v. Brenton*, 3 M. & R. 266. *Rex v. Smith*, 2 Show. 287, *contra*.

(4) 1 Lev. 68; Kel. 15. S. C. 1 Sid. 65, S. C.

(5) Pl. Cr. b. 2, c. 46, s. 210.

(6) *Rex v. Inhabitants of Preston*, Rep. temp. Hard. 251.

(7) 1 Leon. 5.

(8) *Rex v. Higgins and others*, 1 Vent. 366. See also *Rex v. Nutt*, 1 Barnardist. 307, a prosecution for a libel.

(9) Rep. temp. Hard. 251. *Rex v. Stratten and others*, 21 Howell's St. Tr. 1187.

Quarter sessions.

A bill of exceptions cannot be allowed by the justices of the peace at the quarter sessions, on the hearing of an appeal against an order of removal. (1) It can be used only on a writ of error, and therefore where a writ of error will not lie, there cannot be a bill of exceptions. (2) And on the trial of a feigned issue out of the Court of Chancery, a party is not entitled to a bill of exceptions. (3)

When tendered.

A party cannot avail himself of a bill of exceptions, unless he insist upon the exception at the trial. If he waives it, he acquiesces, and cannot resort back to the exception after a verdict. The statute appoints not any precise time for tendering a bill of exceptions; but the nature and reason of the thing requires, that the exception should be reduced to writing, when taken and disallowed: not that the exceptions need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record. (4)

When a bill of exceptions has been tendered, the Court will not grant a motion for a new trial, unless the bill of exceptions be abandoned. (5) And if a party, who has tendered a bill of exceptions, bring a writ of error, before he has procured the Judge's signature, he thereby waives the bill of exceptions, and will not be permitted afterwards to tack or append the bill to the writ of error. (6)

Demurrer to evidence.

A demurrer to evidence is a proceeding, by which the Judges, whose province it is to determine questions of law, are called upon to declare, what the law is upon the facts in evidence. And it is analogous to the demurrer upon facts alleged in pleading. (7)

(1) See (2) *supra*.

(2) Bull. N. P. 316.

(3) Bullen v. Michel, 2 Price, 416. Wood, B., dissent.

(4) By Holt, C. J., Wright v. Sharpe, 1 Salk. 288.

(5) 2 Chit. Rep. 272.

(6) Dillon v. Parker, 1 Bing. 17. But it seems this rule is not im-

perative, and that when the bill of exceptions has been delayed from the fault of the defendant above, or for other sufficient reasons, the Court will allow the bill of exceptions to be tacked to the record *nunc pro tunc*. Taylor v. Williams, 4 B. & Ad. 846.

(7) See the judgment of Eyre,

When the admissibility of the evidence has been established, Object of. the question, how far it conduces to the proof of the facts, which are to be ascertained, is not for the Judge to decide, but for the jury exclusively. And when the jury have ascertained the fact, if a question arises, whether the fact thus ascertained maintains the issue joined between the parties, or, in other words, whether the law arising upon the fact is in favour of one or other of the parties, that question is for the Judge to decide. (1) Ordinarily, he declares to the jury, what the law is upon the fact which they find, and then they compound their verdict of the law and fact. But if the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence. (2)

It is reasonable, that either party should have such a power of referring to the Court to decide, what the inference of law is upon the facts; as the jury may refuse to find a special verdict, in which case the facts would not appear on the record. On What it admits. the other hand, as it is the peculiar province of the jury to ascertain the truth of facts and the credibility of witnesses, the party ought not to be allowed, by a demurrer to evidence, or any other means, to refer the trial of such questions to another tribunal. A demurrer must therefore admit the truth of all facts, which the jury might find in favour of the other party upon the evidence laid before them, (3) whatever the nature of that evidence may be, whether of record, or in writing, (4) or by parol. (5) According to Alleyn's report of the case of *Wright v. Pindar*, it was resolved, "that he that demurs upon the evidence ought to confess the whole matter of fact to be

C. J., in *Gibson and Johnson v. Hunter*, 2 H. Bl. 205, 206.

(1) 2 H. Bl. 205.

(2) 2 H. Bl. 206. 2 Barn. & Cress. 443.

(3) And per Eyre, C. J., in delivering the opinion of the Judges in *Gibson v. Hunter*, 2 H. Bl. 209, it must distinctly admit upon the record "every conclusion which the

evidence tendered *conduced* to prove." If this be so, a sufficient reason is shewn, why a demurrer to evidence stops the cause; as to the issue to which the evidence relates, there would then be nothing left for the jury to try.

(4) Baker's case, 5 Co. Rep. 104.

(5) *Wright v. Pindar*, Alleyn, 18. 2 H. Bl. 207.

true, and not refer that to the judgment of the Court; and if the matter of fact is uncertainly alleged, or it is doubtful whether it be true or no, because offered to be proved only by presumptions or probabilities, and the other party demurs thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the Court, that he may not be admitted to his demurrer, unless he will confess the matter of the fact to be true." And now it is an established rule, that in a demurrer to circumstantial evidence, the party, offering the evidence, is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion, which the proposed evidence conduces to prove. (1)

When all matters of fact are admitted, the case is ripe for judgment in matter of law upon the evidence, and may then be properly withdrawn from the jury; and being entered on record, it will remain for the decision of the Judges. (2)

Not in the
King's case.

If in an information, or any other suit, evidence be given for the King, and the defendant offers to demur upon it, the King's counsel cannot be compelled to join in demurrer, but in such case the Court ought to direct the jury to find the special matter; and upon that they shall adjudge the law. (3)

The whole proceeding upon a demurrer to evidence is under the control and direction of the Judge at *nisi prius*, or of the Court on a trial at bar. (4) "The Court," said Mr. Justice Doddrige, "in the case of *Worsley v. Filisker*, (5) may deny and hinder a party from demurring, by over-ruling the matter in demurrer, if it seem to them to be clear in law:" and, in that case, the Court did over-rule the demurrer, and left the case to the jury. If the Judge over-rule the demurrer improperly, that may be made the subject of a bill of exceptions. (6)

(1) *Gibson and Johnson v. Hunter*, 2 H. Bl. 187. *Cocksedge v. Fanshaw*, 1 Doug. 119—134.

(2) 2 H. Bl. 208.

(3) 5 Co. Rep. 104. Bull. N. P.

313.

(4) 2 H. Bl. 208.

(5) 2 Roll. Rep. 119. Bull. N. P.

314. 2 H. Bl. 208.

(6) 2 H. Bl. 209.

Where a demurrer to evidence is admitted, it is usual for the Court or Judge to give orders to the associate to take a note of the testimony: this should be signed by the counsel on both sides, and the demurrer is then affixed to the postea. (1)

Form of drawing up.

Upon a demurrer to evidence, the damages may be assessed conditionally by the jury before they are discharged; or they may be assessed by another jury, upon a writ of inquiry, after the demurrer is determined. (2)

Assessment of damages.

(1) Bull. N. P. 313.

(2) *Herbert v. Walters*, 1 Lord Raym. 60. Plowd. 410. 1 Doug. 222, n. In *Miller v. Warre*, 1 C. & P. 239, Mr. Justice Park ruled,

that "on a bill of exceptions, the case always goes to the jury, but on a demurrer to evidence, it is otherwise."



Lord Stumans Act 627 Victoria c 85
First act to official & then
Documents 819 Victoria c 113
Art of practice &c. 1405 Victoria c 99.

INDEX.

ABATEMENT, plea of

found in favour of defendant on joint indictment, renders him competent, 69.

for non-joinder of co-contractor, cannot be supported by his evidence, 85.

ABORTION

on charge of procuring, dying declarations of woman inadmissible, 295.

ABDUCTION. See tit. *Forcible Marriage*.

ABSTRACT,

when admissible in proof of deed, 683.

ACCEPTANCE

of Bill of Exchange

admission of, during treaty for compromise admissible, 367.

notice to produce bill amounts to, when, 369.

avowment of when considered immaterial, 834.

of benefit, presumption as to, 480.

ACCEPTOR,

drawer generally competent witness for or against, 125.

rendered competent for drawer by release, 152.

estopped from disputing handwriting of drawer, 383.

possession of bill by, presumption of payment, 479.

accommodation—whether drawer competent witness for, 109—112.

ACCESS, and see *Non-Access*.

general presumption of, 462.

how rebutted, *ib*.

when to be presumed, 463.

ACCESSARY. See tit. *Principal Felon*.

conviction of principal evidence against, when, 520.
 cannot be convicted if charged as principal, 850.
 prisoner indicted as, cannot be convicted as principal, 851.
 principal competent against, 29.

ACCOMPLICE,

competency of as witness on criminal prosecution, 25.
 general rule as to, stated and considered, 26.
 evidence of, given under promise of pardon, 27.
 effect of express promise, 27,
 of implied promise, *ib*.
 not bound to answer as to other offences, 27 n (3) 914.
 admissibility of, in discretion of the judge, 28.
 admissible though convicted, if not attainted, 28.
 jointly indicted, when admitted. See tit. *Party*.
 breaking condition on which pardon promised, how dealt with,
 29.
 admissible for prisoner, *ib*.
 confirmation of, not necessary to legality of conviction, 30.
 but always required in practice in cases of felony, 30.
 as to misdemeanors, 31 n (2) *ad fin*.
 to what extent necessary, 33.
 as to identity of prisoner, review of cases where not re-
 quired, 35.
 of cases where required, 35.
 now generally required, 37.
 by another accomplice insufficient, 38.
 by wife of accomplice insufficient, 39.
 who is not, 39.
 wife of, competent for prosecution, 115.

ACCOUCHEUR,

declaration of, whether admissible in cases of pedigree, 244.
 as to time of birth, 326.

ACCOUNT,

delivery of, evidence of credit, when, 377.

ACQUIESCENCE,

admission inferred from, when, 373.
 license from lord, when presumed from, 478.

ACQUITTAL,

judgment of inadmissible, unless for same offence, 523.
 though same right in litigation, 524.
 in Exchequer, whether conclusive as to illegality of
 seizure, 552.
 how proved, 622.

ACT OF PARLIAMENT. See tit. *Statute*.

- ACT OF STATE,
 how proved, 591.
 of foreign country, how proved, 626.
- ACTS OF OWNERSHIP,
 on other portions of land, when admissible in proof of property,
 487.
- ACTS OF PARTY,
 operate as recognition of certain character, when, 369.
 presumption of appointment to office arising from, 469.
- ADDRESS,
 of House of Lords, when admissible as evidence, 590.
 how proved, 591.
 when Gazette evidence of, 592.
- ADJUSTMENT,
 on policy, not conclusive against underwriter, 389.
- ADMINISTRATION, and see tit. *Probate*.
 how proved, 647.
 not evidence of death, 547.
 how far conclusive, *ib*.
- ADMINISTRATOR, and see tit. *Executor*.
 bond security, competent witness for, 117.
 creditor, 118—119 and *n* (2).
 admission of intestate, evidence against, 412.
 judgment against intestate, binding on, 517.
- ADMIRALTY,
 courts of, judgments of when conclusive, 533, 550.
 when not, 534.
 when no special ground stated, 534.
 where insufficient ground stated, *ib*.
 where statement of ground ambiguous, 535.
 how to be constituted to make judgment conclusive, *ib*.
- ADMISSION,
 when whole statement containing must be received, 357.
 whole of answer, *ib*.
 amended answer, *ib*.
 writing referred to, *ib*.
 whole of conversation, 358.
 examination on which documents produced, *ib*, 360.
 books, &c. referred to by answer, 360 *n* (3).
 when not
 part of conversation not necessary for explaining dis-
 crediting admission, 359 *n* (1).
 distinct entry, 359.
 answer to letter, *ib*.
 part of examination not reduced to writing, *ib*.

ADMISSION—*continued.*

- bill, &c. to which answer put in, 360.
- answer referring to letter, 360.
- when favourable part of admission received as conclusive, 362.
- contract referred to in admission, 362.
- counter-claim set up, *ib.*
- hearsay contained in admission, 363.
- notice to produce writings referred to in admission, necessary when, 364.
- contents of deeds, *ib.*
- by parol, not admissible to contradict documentary evidence, 365.
- nor to prove matter of record, *ib.*
- discharge under Insolvent Act, *ib.*
- conviction, *ib.*
- made during treaty for compromise, not admissible, 365.
- if declared to be without prejudice, 366.
- unless where compromise completed, *ib.*
- or admission made before an arbitrator, *ib.*
- or where not bearing on merits, 367.
- and offer to compromise may be proved, *ib.*
- on compulsion of law
 - in civil cases, 367.
 - examination in bankruptcy, *ib.*
 - in criminal cases,
 - examination before parliamentary committee, 368.
 - bankrupt's balance sheet, *ib.*
- by implication
 - of acceptance, &c. of bill, in notice to produce, 368.
 - of title, in notice of sale, 369.
 - of situation of parties, by attorney's undertaking to appear, *ib.*
- of particular character, by recognition or assumption, *ib.*
 - appointment to office, *ib.*
 - title as parson, 370.
 - title as assignee, 371.
 - admission as an attorney, *ib.*
 - qualification by degree, *ib.*
 - proprietorship of newspaper, 370 n (2).
 - right to vote, 371 n (3).
- by acquiescence
 - of tenancy in notice to quit, 373.
 - by bankrupt as to petitioning creditor's debt, *ib.*

ADMISSION—*continued.*

- of ownership, by forbearance, 373.
- by statement uncontradicted, 374.
- unanswered letter does not amount to, *ib.*
- nor unanswered statement of stranger, 375.
- by access to documents
 - book accessible to both parties, 375.
 - book of public company, *ib.*
 - court rolls not admissions by copyholders, 376.
 - except as to manorial customs, *ib.*
 - papers found on prisoner, *ib.*
 - corporation books not admissions by corporator as individual, *ib.*
- by conduct
 - of non existence of claim, by omission in schedule, 377.
 - to whom credit given, by delivery of account, *ib.*
 - of matter of law, *ib.*
 - of marriage, by admission of adultery, 377 * (4)
- effect of, when amounting to estoppel
 - rules as to estoppels, how far applicable, 378.
 - estoppel of bankrupt from disputing bankruptcy, when, 379 and * (2).
 - of petitioning creditor, 380.
 - of accounting party, by part payment, *ib.*
 - of ostensible husband, partner, &c.
 - of tenant, 381.
 - not by mere attornment, 382.
 - of acceptor of bill, 383.
 - of agent, by account rendered, *ib.*
 - in cases of misnomer, 384 * (1).
 - of owner, by bill of lading, *ib.*
 - of wharfingers, *ib.*
- when not conclusive,
 - oath as to amount of property before commissioners, 385.
 - omission of debt in schedule, *ib.*
 - entry at Custom House, *ib.*
 - bankrupt giving up lease to lessor, *ib.*
 - or surrendering, *ib.*
- on oath
 - answer in equity, available for persons not parties to suit, 386.
 - affidavit, against party using it, *ib.*

ADMISSION—*continued.*

by deed

between parties, operates as estoppel, 386.

between party and stranger *prima facie* evidence of facts, 387.

unless pleaded as estoppel, *ib.*

whether admissible for stranger against party, 388.

in writing

receipt not conclusive, 388.

though indorsed on deed, *ib.*

or negotiable security, 389.

but if *in* deed acts as estoppel, 388, n. (2)

adjustment on policy, *ib.*

not conclusive when mistake in law or fact, *ib.*

inventory for probate

in general not evidence, *ib.*

nor probate stamp

of present assets, *ib.* and n. (6)

invoice

when conclusive, 389.

delivery of bill by attorney, 390.

inscription on stage-coach, *ib.*

parish certificate, *ib.*

paper written by one and signed by another, *ib.*

bill in Chancery, 391.

verbal, 391.

by whom to be made, 392.

party to suit

though only nominal, 393.

after assignment of interest, 394.

or party beneficially interested,

cestui trust of bond, 394.

party interested in policy, *ib.*

in freight, *ib.*

party under whom cognizance made, 395. n. (1)

rated inhabitants, 395,

members of corporations, 395. n. (2)

indemnifying party, 396.

petitioning creditor, *ib.*

by stranger to suit,

party jointly liable, 397.

bankrupt, *ib.*

petitioning creditor, *ib.*

not by party, before commencement of title, 398.

assignee, *ib.*

ADMISSION—*continued.*

- prochein amy, 398.
- by other party to suit jointly interested,
co-covenantor, 399.
- by partner party to suit, *ib.*
- by partner not party, *ib.*
 - part owner, 400.
- by co-contractor, *ib.*
- by agent, 401.
 - if authorized to admit, 401.
 - and admission made at time of contract, 404.
 - express authority to admit, 405.
 - referee, *ib.*
 - interpreter, *ib.*
 - jury, 406.
 - implied authority where,
 - undersheriff, 406.
 - bailiff, 407.
 - wife, *ib.*
 - guardian, 408.
 - attorney, 409.
 - counsel, 410.
 - in criminal cases, 410.
 - may be proved without calling agent, 418.
- by principl debtor, 411.
- by privies in blood
 - ancestor of occupier, 412.
- by privies in law
 - intestate, *ib.*
- by privies in estate
 - lessee of tithes, 413.
 - landlord, *ib.*
 - predecessor in living, *ib.*
 - former bishop, *ib.*
 - former owner as to tithes, 414.
 - as to boundaries, *ib.*
 - steward of party claimed under, 415.
 - prior holder of negociable security, *ib.*
 - only where interest identical, 416.
 - not against indorsee before due, for valuable consideration, *ib.*
 - not admissible if made after privity determined, 417.
 - former owner after conveyance, of interest, *ib.*

ADMISSION—*continued*.

mortgagor after conveyance of estate,
417.

by execution creditor after assignment,
ib.

may be proved without calling author, though alive, 418.

rule as to secondary evidence, inapplicable to, 448.

fact admitted by pleadings, when must be proved, 831.

of infamy by witness, not sufficient to incapacitate, 19.

ADMISSION OF ATTORNEY,

proof of, when dispensed with by admission, 371.

ADMISSION TO COPYHOLDS,

how proved, 639.

AD QUOD DAMNUM,

when presumed, 475.

ADULTERY,

wife competent to prove, in cases of bastardy, 171.

character of wife, relevant inquiry in action for, 488.

conversation and letters shewing terms on which husband
and wife lived, admissible, 201.

if before criminal intercourse, *ib.*

declarations of wife at time of elopement, when admissible, 206.

admission of, renders proof of marriage unnecessary, when,
377, n. (4)

AFFIDAVIT,

of person convicted of infamous crime, inadmissible if com-
plainant, 19.

admissible in his own exculpation, *ib.*

admissible evidence as shewing step taken in a prosecution,
198.

operates as admission against deponent, 385.

how proved, 629, n. (6)

in equity, examined copy admissible, 629.

office copy of, when admissible, 613.

on putting off trial, 801.

AFFIRMATION,

of Quakers, Moravians, and Separatists, effect of, 13.

AFFIRMATIVE. See tit. *Onus Probandi*.

AGE,

presumption of law, arising from, 462.

AGENT,

liability of, renders incompetent as witness, when

for plaintiff, notwithstanding 3 & 4 W. 4, c. 42, 110.

for defendant

AGENT—*continued.*

- when employed to discount bill, 105.
- through whose act alleged injury happened, 109, *sed vide*, 112.
- competent witness for principal, to prove act done in the usual course of business, 140.
- except where the transaction the only act of agency, 141.
- not competent where act out of scope of authority, 142.
- or to disprove his own negligence, 141.
- account of receipts by, conclusive against, when, 383.
- admissions by, general rule as to, 401.
- evidence against principal when made at, time of the contract, 404.
- in criminal cases, 410.
- may be proved without calling agent, 410. And see tit. *Admission*.

payment to, sufficient proof under plea of *solvit ad diem*, 846.

AGREEMENT. See tit. *Contract*.

ALLEGATION IN PLEADING,

how supported. See tit. *Substance, Variance, and the title of respective subjects of Allegation*.

by whom to be proved. See tit. *Onus Probandi*.

ALLOTMENT

of commissioners of inclosure, how proved, 442.

ALTERATION

of contract, parol inadmissible as to, if contract under seal, 774.

parol admissible if contract, not under seal, *ib.*

AMBIGUITY,

admissibility of parol evidence to explain. See tit. *Parol Ev.*

AMENDMENT

of record at *nisi prius*. See tit. *Variance*.

ANCESTOR,

admission of tenancy by, evidence against adverse possession, 412.

ANCIENT WRITINGS,

proof of, 632.

proper custody of, 633.

secondary evidence of, 685.

signature to, proof of by comparison, 701.

usage admissible in construction of, 745.

ANNUITANT

under will, competent witness to increase fund, 118.

ANNUITY-DEED,

- presumption as to enrolment, 470.
- order for inspection of, 823.
- examined copy of enrolment evidence of memorial, when, 690.

ANSWER IN EQUITY

- admissible as evidence in matters of pedigree, 231.
 - unless *post litem motam*, *ib.*
- admission contained in
 - may be explained by other parts of answer, 357.
 - or by amended answer, *ib.*
 - bill, &c. need not be produced, 360.
 - answer referring to letters, *ib.*
 - hearsay contained in, how far receivable, 363.
 - conveyance stated in, when considered as proved, 365.
 - admissible for strangers to the suit, 386.
 - against privies in estate, 413.
 - not where privity determined before answer, 417.
- how proved, 620.
 - bill must be produced, *ib.*
 - unless shown to be lost, *ib.*
 - or answer used to contradict witness, *ib.*
 - or on indictment for perjury, *ib.*
 - or as admission, *ib.*
 - in civil suits oath presumed, 620.
 - but must be proved on indictment for perjury, *ib.*
 - or in action for malicious prosecution, 621.
- identity of defendant how proved, 621.

APPOINTMENT

- to office, admission of by acts of party, 369.
- presumed from exercise, 453, 469.

APPROVER. See tit. *Accomplice*.ARBITRATION. See tit. *Award*.

ARBITRATOR,

- award by, how far conclusive, 555.
- option of, as to disclosure of communications made to him, 175, n. (1.)
- admission made before, may be given in evidence, 366.
- attendance of witnesses before, how obtained, 794.

ARMORIAL BEARINGS,

- when admissible evidence in matters of pedigree, 235.

ARREST,

- privilege of witness from. See tit. *Witness*.

ARSON,

immaterial averment in cases of, 854.

ARTICLES OF THE PEACE,

on exhibition of, by wife against husband, affidavits to contradict inadmissible, 170.

ARTICLES OF WAR,

how proved, 593.

ASSAULT. And see tit. *Son Assault Demesne.*

wife competent against husband on indictment for, 170.

pleas of justification, when considered as proved, 847.

plea of guilty to indictment of, and payment of fine renders defendant competent for co-defendant, 69.

ASSIGNEES OF BANKRUPT. See tit. *Bankrupt and Creditor.*

official, competent witness to support fiat, 120.

admissions by, before choice, not evidence against, 398.

ASSIGNMENT,

fraudulent, declarations &c. of assignor how far admissible to prove, 207.

of judgment, how proved, 690.

ASSIGNOR

competent to prove that he had no property in thing assigned, 42.

ASSUMPSIT. See tit. *Contract.*

proof of less than amount demanded allowable, 847.

ATHEIST

incompetent to be witness, 11.

ATTACHMENT

against witness for non-attendance, 785.

for non-production of papers according to order, 825.

ATTAINDER,

proof of, 19.

how removed, 21.

parliamentary, how shown not to have been incurred, 21.

ATTENDANCE

of witness,

how enforced, 779.

remedies for non-attendance, 785.

where witness in custody, 783.

before commissioners of bankrupt, 793.

before justices, *ib.*

before courts martial, *ib.*

before inclosure commissioners, *ib.*

before arbitrator, 794. And see tit. *Witness.*

ATTENDANT TERM,

surrender of, when to be presumed, 476.

ATTESTING WITNESS

- convicted of infamous crime, proof may be given of his handwriting, 19.
- competent to impeach the validity of instrument, 42.
- having acquired subsequent interest in instrument, incompetent, 147.
- attorney, bound to answer as to execution of deed, 186.
- deceased, declarations of not admissible, 221, 292.
 - general evidence of character admissible as to, 945.
- proof of execution by one of several, sufficient, 438.
- proof by, of execution of instrument when dispensed with, 651.
 - not by admission of party, 650.
 - instrument thirty years' old, 651.
 - instrument produced by party claiming under it, 655.
 - witness not forthcoming, 657.
 - dead, *ib.*
 - blind, *ib.*
 - insane, *ib.*
 - infamous, *ib.*
 - abroad, *ib.*
 - witness interested, 657.
 - illness of witness, 658.
 - absence of witness, *ib.*
 - fictitious witness, 660.
 - unauthorized witness, *ib.*
 - witness denying signature, *ib.*
 - several attesting witnesses, 661.
 - effect of proof of witness's handwriting, *ib.*

ATTORNEY,

- communications made to, when privileged from disclosure.
 - See *tit. Privileged Communication.*
- entry made by deceased attorney evidence of legal proceeding, 326.
- undertaking to appear by, operates as admission, 369.
- delivery of bill by, does not operate as estoppel, 390.
 - not dispensed with by admission of debt, *ib.*
 - may be proved by secondary evidence, 454, 671.
- admission by, how far binding on client, 409. And see *Admission.*

ATTORNEY, LETTER OF,

- Secondary evidence of, what sufficient to admit, 677.

ATTORNMENT,

- tenant not estopped by, 382.

AUCTIONEER

- declarations by varying conditions, not admissible, 772.
- admission of property by, in advertisement for sale, 369.

AVERMENT

- by whom to be proved
 - affirmative, 827.
 - negative, 828.
 - against presumption of law, 829.
 - of fact peculiarly within knowledge of party, *ib.*
 - of fact admitted by pleadings, 832.
- what sufficient proof of. See tit. *Variance and Substance.*

AWARD

- on same dispute, inadmissible, in questions of boundary, 278.
- allotments in execution of, how proved, 442.
- of arbitrator, when conclusive, 555.
 - submission must be proved, 627.
 - and appointment of referee, *ib.*

BAIL

- incompetency of as witness for defendant, 80.
 - how removed, 80, 156.
- wife of incompetent, 80, 159.

BAILIFF. And see *Officer*

- admissions by party under whom cognizance made, how far evidence, 395, n (1)
- judgment against, admissible against landlord, 516.

BALANCE,

- general may be proved by parol, 454.

BANK BOOK

- evidence of transfer of stock, 598.
- proved by examined copy, 639.

BANKER,

- not privileged from answering as to customer's balance, 176.
- possession of document by considered as possession of owner, 664.

BANKRUPT

- incompetent witness to increase fund, 87.
 - or support fiat, *ib.*
- rendered competent, how, 88, n. (2).
- wife of, incompetent to prove bankruptcy, 159.
- letters to, when admissible to prove act of bankruptcy, 197.
- directions by, as to denial to creditor, 198.
- letters and declarations of, admissible in proof of trading or act of bankruptcy, 208.
 - must be made within reasonable time after act, *ib.*

BANKRUPT—*continued*.

what considered reasonable time, 208.

what, too remote, 210.

balance sheet not admissible against, on criminal charge, 368.

conduct of, before commissioners, admissible evidence of petitioning creditor's debt, 873.

estopped from disputing commission by applying for discharge from custody, 379, 385.

not by giving up lease, 378, n. (2).

by other acts when, *ib.* 385.

BANKRUPTCY,

proof of, when renders bankrupt competent witness for co-defendant, 57.

effect of *nolle prosequi*, to plea of bankruptcy, 55.

separate verdict, effect of, and when allowed, 56, 58.

proceedings in, whether solicitor bound to produce, 186.

examinations in, evidence against examinant, 368.

admission of, advertisement by auctioneer amounts to, when, 369.

attending meeting of commissioners, when, 371.

suing out commission, 380.

by bankrupt. See *Bankrupt*.

depositions inconclusive in certain cases, 576.

BARGAIN AND SALE. See tit. *Enrolment*.

BARON AND FEME. See *Husband and Wife*.

BARRATRY.

conviction of, incapacitates witness, 17.

BASTARDY. See tit. *Legitimacy*.

married woman competent to prove adultery, 171.

but not *non access*, 169.

presumption of, 462.

where birth after divorce, *a mensd*, 463.

alleged putative father, privileged from answering question as to that fact, 914.

BATTERY. See *Assault and Trespass*.

BEGINNING AND REPLY,

which party entitled to, at trial,

general rule, 834. And see tit. *Onus Probandi*.

where consideration impeached, 834.

where issue as to amount due to plaintiff, 835.

exceptions to rule,

actions for personal injuries, 836.

libel and slander, *ib.*

BEGINNING AND REPLY—continued.

- if action in substance for tort form im-
material 836.
- where there are several issues, 839.
- in ejectment, depends on real issue to be tried, *ib.*
 - what admissions entitle party to begin, *ib.*
- evidence in reply, when admissible,
 - election of plaintiff to give evidence in chief
in answer to defendant's case, 843.
 - effect of his electing to do so, *ib.*
 - where defendant proves specific fact, *ib.*
- general reply, right to,
 - where evidence on both sides, 843.
 - where no evidence in answer, 844.
 - where new fact stated but not proved, *ib.*
 - in criminal cases, 844.

BELIEF,

- of witness as to facts, when admissible, 898.

BIBLE,

- entry in, admissible as matter of pedigree, 229.
- when author of entry must be shewn, 243.

BIGAMY,

- proof of marriage, when dispensed with by admission, 377,
n. (4).
- provisions of 9 G. 4, c. 31, as to effect of divorce, in cases of,
549.
- consent to marriage of infant, by whom to be proved on
prosecution for, 831.
- sentence in jactitation suit, not conclusive as to marriage, 546.
- first marriage not proveable by husband, 161.
how proved, 447.

BILL IN EQUITY,

- admissible as evidence in matters of pedigree, 231.
unless *post litem motam*, *ib.*
- whether admissible as evidence by way of admission, 391, 557.
- admissible to shew facts in issue, 557.

BILL OF EXCEPTIONS,

- what, 946.
- in what cases allowed, 947.
- when to be tendered, 948.
- effect of, *ib.*
- how waived, *ib.*

BILL OF EXCHANGE,

- parties to when competent as witnesses, 125. And see *the
respective Titles*

BILL OF EXCHANGE—*continued*.

- dishonour of, may be proved by entry made by deceased notary's clerk, 340.
- notice of dishonour of, proveable by secondary evidence, 454.
- admission as to, by prior holder, when evidence, 415.
- general mode of dealing as to, proveable by parol, 454.
- payment of, when presumed, 479.
- attested, must be proved by attesting witness, 652.
- contemporary parol agreement at variance with terms of, not admissible, 756.
- parol evidence admissible to show want of consideration, 757, n. (2)
 - or illegality, 758.
 - or fraud, *ib*.
- proof of indorsement after due, sufficient to support averment of indorsement before, 852.
- acceptance of, when immaterial averment, 854.

BIRTH,

- time of, matter of pedigree, 225.
- place of, not, 226.
- may be proved by entry of deceased accoucheur, 326.

BISHOP,

- admissions of, evidence against successor, 414.

BISHOP'S REGISTER,

- when admissible as evidence, 601.
- inspection of, when ordered, 808.

BLANK

- in will, parol inadmissible to supply, 750.

BOND. See *Obligor*.

- cestui que trust* of, admission by, received against obligee, 394.
- old, how proved, 652.
- different condition to that contained in, cannot be shewn by parol, 761.
- plea of *solvit ad diem* on, how supported, 846.
- to husband and wife, how averment of supported, 859.

BOND SECURITY,

- for administrator, competent witness for administrator, 117.

BOOK,

- entries in. See *Entry, Register*.
- of navy office, evidence of death of sailor, 597.
- of bank, evidence of transfer, *ib*.
- Lloyd's, evidence of capture, 598.
- at master's office, to prove party attorney, *ib*.
- of prison, to prove date of commitment. *ib*.

BOOK—*continued.*

- of clerk of peace, to prove grant of deputation as gamekeeper, 598.
- of custom house, as to cargo, *ib.*
- of poll books at election, *ib.*
- of parish, for copies of rates, 599.
 - for descent of paupers, &c., *ib.*
 - for recording indentures, *ib.*
- of vestry, to prove election to parish office, 600.
 - to prove right to pew, *ib.*
- of rates, to prove existence and residence of parishioner, 601.
- of land-tax collector, as to seizin, 601.
- of bishop, as to admission of curate, 601.
- of corporation,
 - what is, 641.
 - when may be proved by examined copy, *ib.*
 - proper custody of, 641.
 - admissible to prove entry of public notice, 604.
- judgment book not admissible to prove judgment, 616.
 - nor prothonotary's book, *ib.*
- minute book of inferior court, to prove judgment, 622.
 - of quarter sessions, not admissible, 623.
- ancient, proper custody of, 635.
- public, proved by examined copy, 639.
- ledger, of ecclesiastical court, to prove relationship, 646.
- act book of ecclesiastical court, to prove grant of administration, 647.
- book of revocations, to prove probate revoked, 647.
- inspection of public book, when ordered, 806, 809.

BORROWER,

- competent for plaintiff, in penal action for usury, 116.

BOUNDARY,

- parochial and manorial,
 - prescription as to may be proved by reputation, 251.
 - maps of, 262.
 - perambulations, 259.
 - award as to, 278.
 - declarations of deceased inhabitants, 283.
 - surveys admissible evidence of, when, 415.
- private,
 - reputation inadmissible to prove, 255.
 - presumption as to ownership of, 472.

BREACH

- of duty, proof rests on party charging, 827.
- of covenant, involving negative, proof of on plaintiff, 828.
- of contract or duty, proof to extent of allegation unnecessary, 847.

BRIBERY

at election, party who has been bribed, competent witness, 41, 131.

attempt to bribe, admission of voter's right, 371 n. (3.)
of witnesses, incapacitates witness, 17.

BRIBING WITNESS,

conviction of, incapacitates as witness, 17.

BROKER,

competent witness for principal though claiming lien, 140.
not competent in action against principal, when broker's misconduct alleged, 97, 141.

BULL OF THE POPE,

when admissible, 594.

BURGLARY,

previous larceny on same premises inadmissible as presumption of, 493.

on charge of, prisoner may be convicted of larceny, 849.

immaterial averment in indictment for, what considered, 855.

BYE-LAW,

when presumed from usage, 478.
inspection of, when ordered, 811.

CAPTAIN

in action on policy incompetent as to question of deviation, 103 n. (3.)

competent as to original destination, 120.

competent to prove receipt of money by himself to use of owner, 123.

admission of owner, evidence against, in action for freight, 395.

possession of document by, considered as possession by owner, 664.

CAPTION,

of record, 623.

CARRIER,

competent witness to prove delivery of goods, 141.

in action against, what considered as variance, 855.

CAUSE OF ACTION,

identity of, must be proved, when former judgment set up, 509.
how to be inferred, .

CERTIFICATE,

parish, how far conclusive, 395.

apothecary's, proof of lies on defendant, 465.

parish, presumption of its regularity, 470.

CERTIFICATE—*continued*.

- proper custody of, 636.
- of conviction, admissible by statute, 607.
- of matters of law and fact, sometimes admissible, *ib*.
- under sign manual, inadmissible, 608.
- of foreign minister as to marriage, *ib*.
- of secretary at war, *ib*.
- of justices, *ib*.

CESTUI QUE TRUST,

- conveyance of legal estate to, when presumed, 476.

CERTIORARI,

- on indictment removed by, prosecutor competent witness, 143.

CHANCERY,

- proceedings in. See tit. *Equity, Admission, Depositions, and the titles of the respective proceedings.*

CHARACTER. And see tit. *Infamy*.

- hearsay admissible evidence with regard to, 199.
- evidence as to
 - in civil suits not generally allowed, 488.
 - unless character the point in issue, *ib*.
 - adultery, *ib*.
 - defamation, *ib*.
 - seduction, 489.
 - malicious prosecution, *ib*.
- in criminal cases,
 - of prosecutrix in rape, 490.
 - of prisoner, *ib*.
 - must not be of particular acts, 491.
- effect of, 491.
- witnesses as to, not usually cross-examined, 492.
- may be answered by proof of previous conviction, *ib*.

- question degrading to, witness privileged from answering, 916.

CHARTER-PARTY,

- attesting witness to, having acquired subsequent interest, incompetent, 147.
- parol evidence inadmissible to vary terms of, 755.

CHARTULARY,

- when admissible in proof of ancient writing, 633—686.
- proper custody of, 633.

CHEAT,

- other acts of cheating, admissible on indictment for, 497.
- in game, loser competent witness on indictment for, 67.

CHILDREN,

- competent as witnesses, if of sufficient understanding, 5.

CHILDREN—continued.

- cannot be examined without oath, *ib.*
- trial postponed to instruct in nature of an oath, 6.
 - when application should be made, *ib.*
- statements by, made to others inadmissible, *ib.*
- preliminary inquiry as to competency of, how conducted, 7.
- evidence of, though unsupported sufficient to convict, *ib.*

CHINESE,

- how sworn, 10 n. (3).

CHIROGRAPH

- of fine, evidence of fine, 614.
 - but not of proclamations, 615.

CHRONICLE. See *History*.**CHURCHWARDEN,**

- entry by deceased churchwarden admissible as to customary obligation to repair church, 327.

CIRCUMSTANTIAL EVIDENCE. See tit. *Presumption*.**CLERGYMAN.** And see *Parson*.

- confessions made to, not privileged, 177.
 - quære*, if bound to answer, *ib.* n. (2.)
- declarations of, inadmissible in matters of pedigree, 245.

CLERK,

- of attorney, communications made to privileged, 175.
- of barrister, *ib.*
- to commissioners, &c. communications to, not privileged, 177.
 - construction of oath of secrecy, *ib.*
 - acknowledgment of evidence of appointment, 371.
- entry by deceased clerk admissible, to prove tender, 327.
 - delivery of bill, 339.
 - dishonor of bill of exchange, 340.

CO-CONSPIRATOR. See tit. *Conspiracy*.**CO-CONTRACTOR,**

- not competent as witness, when, 85.
- release to one, renders all competent, 153.
- admission of one, evidence against all, 399, 400.

CO-DEFENDANT. See tit. *Defendant*.**COHABITATION,**

- marriage presumed from, 463.

COLLECTOR

- of taxes, entries by, evidence of receipt of money, when, 311.
- of tolls, account with, estoppel from disputing appointment, 380.
- entries by, admissible, though fact proveable by living witness, 441.

COLLEGE,

visitors of, their sentences, how far conclusive, 553.

COLONIAL LAW,

how proved, 625.

COMMERCIAL REGULATIONS,

of foreign state, how proved, 624, n. (7), 626.

COMMISSIONER

of turnpike act, competent witness, 135.

of customs, &c., official communications of privileged, 193.

of inclosure, allotments by, how proved, 442.

attendance of witnesses, 793.

for taking affidavits, proof of appointment unnecessary on indictment for perjury, 453.

of excise, judgment of condemnation by, conclusive, 553.

depositions before, when admissible, 567.

for settling debts of army, certificate of conclusive, 553.

of bankrupt, attendance of witnesses before, 793, 783.

COMMITMENT,

prison book evidence as to date of, 598.

not as to cause of, *ib.* n. (5.)

COMMITTEE,

examination before admissible on trial for misdemeanor, 368.

COMMON,

rights of, reputation admissible to prove prescription for, 251.

prescription for, how statement in pleadings to be supported in plea in bar, 858.

in action for disturbance, *ib.*

COMPARISON OF HANDWRITING,

how far allowable by witness, 694.

by jury, 699.

COMPENSATION. See *Expenses.*

COMPETENCY. See tit. *Witness, Incompetency.*

of infamous witness, how restored, 20.

COMPROMISE,

admission during treaty for, not evidence, 365.

if declared to be without prejudice, 366.

unless compromise completed, *ib.*

or admissions made before an arbitrator, *ib.*

or not affecting merits, 367.

offer to, admissible, 367.

CONDEMNATION,

judgment of, when conclusive,

in Exchequer,

when suit in rem, 551.

when in personam, 552.

CONDEMNATION—*continued.*

- of acquittal, 552.
- in court of Admiralty, 551.
- in foreign court of Admiralty, 553.
- by commissioners of excise, *ib.*

CONDITION

- of bond, different to that stated, cannot be shewn by parol, 761.
- of sale, parol declaration of alteration in, inadmissible, 772.

CONFESSION,

- grounds of admissibility, 419.
- whole statement to be received, 420.
- effect of favorable part of, as evidence for prisoner, 421.
- by demeanor, 422.
- how far requires confirmation, 423.
- must be voluntary, *ib.*
 - usual question on that point, *ib.*
 - not admissible if made on oath, 424.
 - made as witness against another, whether admissible, 425.
 - oath administered by mistake, 425.
 - not invalidated by spiritual inducements, *ib.*
 - or by prisoner's intoxication, 426.
 - nor by deception used to extract it, *ib.*
 - nor though consisting of answers to questions, 427.
 - nor though made during illegal custody, *ib.*
 - or without previous caution by magistrate, 428.
 - by whom inducement made renders void, *ib.*
 - constable, 429.
 - prosecutor, 430.
 - strangers, *ib.*
 - objection from inducement removed by subsequent caution, 430.
 - or by discovery of property agreeably to confession, 432.
 - expressions accompanying delivery of property, how far admissible, *ib.*
 - when void, acts done in consequence also inadmissible, 433.
- made by another inadmissible, 433.
 - statement of co-conspirator unless part of *res gestæ*, 434.
- in treason, valid if made to two witnesses, 435.
 - one witness sufficient, where overt act actual attempt on King's life, 436.
 - or if adduced in confirmation of other evidence, *ib.*
 - or relating to collateral facts, *ib.*

CONFESSION—*continued*.

- when reduced to writing cannot be proved by parol, 446.
- subsequent parol statement, 446.
- informal examination, 446.

CONFIDENTIAL COMMUNICATION. See tit. *Privileged Communication*.

CONFIRMATION

- of evidence of child, 17.
- of accomplice, 30.

CONSENT,

- negative of, how proved, 439, 828.
- when to be proved, 828.
- to marriage of infant, by whom to be proved in bigamy, 831.

CONSIDERATION,

- want of, in deed, parol inadmissible as to, 757. And see *Estop*.
- in contract not under seal, parol admissible, *ib*.
- in bill or note, *ib*. n. (2).
- illegality of,
 - in deed, 758, 759, and n. (1).
 - in contract, 758, n. (1.)
 - in bill or note, *ib*. n. (1), *ad fin*.
 - in annuity, 760.
- fraud as to, different considerations stated, 759.
- party charged with fraud cannot prove different consideration, 763.
- different to that stated may be shewn when not inconsistent, 761.
- where none expressed, may be proved by parol, 762.

CONSOLIDATION RULE,

- party to, incompetent as witness, 84.

CONSPIRACY,

- conviction of, when incapacitates witness, 17.
- when not, 18.
- wife of one conspirator incompetent for the others, 169.
- to procure marriage, husband incompetent to prove marriage, 161.
- letters and declarations of co-conspirators when admissible as part of *res gestæ*, 210, 434.
- paper printed by order of co-conspirator, 211.
- drafts of letters, *ib*.
- exclamation of mob, 212.
- inscription on banners, *ib*.
- not letter to non-conspirator containing simple narration, 212.
- tracts, &c., 214.
- treasonable toasts, *ib*.

CONSPIRACY—*continued.*

- papers in co-conspirator's possession before and after apprehension, 214.
- resolution at meeting, how proved, 450.
- to cheat, other acts of cheating evidence on indictment for, 497.
- to riot, previous riotous meeting evidence, 498.
- acts and declarations of prisoner when admissible in his favor, 499.

CONSTABLE,

- inducement held out by, invalidates confession, when, 429.
- what considered insufficient description of, 848.

CONSTAT. See *Exemplification.***CONTEMPT.** See *Attachment.***CONTRACT**

- for mutual indemnity in illegal act, does not render contractor incompetent for defendant co-contractor, 107.
- admission of, may be proved without notice to produce, 364.
- in writing, parol evidence of, inadmissible, 442.
 - as to tenancy, *ib.*
 - work and labour, 443.
 - unless collateral to question at issue, 444.
- terms of, not to be presumed from other contracts, 482.
- admissibility of parol evidence to vary or annul. See *Parol Evidence.*
- breach of, proof to extent of allegation unnecessary, 847.
- statement of, effect of variance in proof, 852, 856.
 - what considered as variance, 855.
 - when sufficient, 856.
 - when allowed to be amended at *nisi prius*, 871.

CONVEYANCER,

- whether confidential communications made to, privileged, 175, n. (7).

CONVEYANCE,

- admission of, how far dispenses with proof of execution, 365.
- in writing, oral evidence of inadmissible, 442.
- of legal estate to beneficial owner, when presumed, 475.

CONVICTION. And see *Judgment.*

- of infamous crime, how proved in order to incapacitate witness, 20.
- admission of, not evidence, 365.
- for penalties in exchequer, not conclusive on strangers, 552.
- by magistrates, copy of, matter of right, 803.

CO-OBLIGOR. See *Obligor.***CO-PLAINTIFF.** See *tit. Plaintiff and Party.*

COPY

- of copy, inadmissible as secondary evidence, 445, n. (2).
- of entry, not admissible to refresh witness's memory, 449.
- examined, of record admissible, 452, 615, 618.
 - of act of state, 626.
 - of court rolls, 452,
 - of foreign law, 624.
 - of entries in public books, *ib.*
 - of judgment of inferior court, 623.
 - of private act, 611.
 - of decree in equity, 619.
 - of depositions in equity, 629.
 - of affidavit in equity, *ib.*
 - of award of *elegit*, 632.
 - of public writings not judicial, 638.
 - of court rolls, 639.
 - of corporation books, 641.
 - of parish register, 642.
 - of ships register, 643.
 - of India registry, 642.
 - of ledger book of ecclesiastical court, 646.
 - of act book of ecclesiastical court, 647.
- under seal of court when proper proof of record, 612.
- office copy evidence, if in same cause, 613.
 - otherwise must be proved to be examined, *ib.*
- made by authorized officer, admissible without proof of examination, 614.
 - chirograph of fine, *ib.*
 - enrolment, *ib.*
 - when not sufficient, 688.
- made by unauthorized officer, must be proved to be examined, 615.
 - copy of judgment by clerk of treasury, *ib.*
 - enrolment with clerk of peace, *ib.*
 - proclamations of fine, *ib.*
- certified, of proceedings in insolvent court admissible, 623.
- attested by judges clerk, of depositions taken at chambers sufficient, 631.
- admissibility of, as secondary evidence, 684.
 - examined copy, 684.
 - copy by deceased clerk, 682, 684.
 - old copy of deed, 683.
 - copy of enrolment, 686.
 - exemplified copy of letters patent, 689.
 - copy of ancient deed, *ib.*

COPYHOLD,

admissions and surrenders to, how proved, 639.

COPYHOLDER,

writings by deceased copyholders, received as evidence of reputation, 262.

declaration against interest by, 317.

inspection of court rolls by, 810.

CORONER,

depositions before, when admissible, 565—570. And see *Deposition*.

inquisition of, not conclusive, 585. And see *Inquisition*.

CORPORATION,

members of, parties to suit, generally incompetent, 48.

unless free from interest, 49.

not parties to suit, incompetent, when, 93.

rendered competent by resignation, 155.

by disfranchisement, *ib.*

how effected, *ib.*

admissions by, how far binding on corporation,

395, n. (2.)

books of, evidence between members, 375, 604.

unless in individual capacity, 376.

admissible to prove public matter, 604.

how proved, 641.

inspection of, when ordered, 810, 812.

CORPORATOR,

competency as witness, 48, 93.

how restored, 155.

COSTS. Incompetency from liability to. See *tit. Witness*.

of prosecution, when allowed, 790. See *Expense*.

of depositions, &c. taken under 1 W. 4, c. 22, 797.

CO-TRESPASSER,

competent for defendant in action for same trespass, 114.

unless when, 60.

COUNSEL,

communications to, when privileged from disclosure. See *tit. Privileged Communication*.

option of, to relate his statements on making motion, 175 n. (1.)

admissions by, how far evidence against client, 410.

COUNTER CLAIM,

set up in making admission, proved by admission, 363.

COUNTERPART

may be proved without notice to produce original, 670.

COURT,

jurisdiction of, prescription may be established by reputation, 251.

judgments of. *See Judgment.*

COURT MARTIAL,

sentence of, when conclusive, 554.

attendance of witnesses before, 793.

COURT ROLLS,

entries on, admissible to prove manorial right or custom, 261, 604.

not otherwise evidence as admissions against copyholders, 376.

copies of admissible evidence, 452, 639.

inspection of when allowed, 807, 810.

COVENANT,

in action of, for waste, proof of acts short of waste inadmissible, 846.

but breach to extent of allegation need not be proved, 847.

qualified, what variance in proof of, 858.

COVERTURE. *See Husband and Wife.*

CREDIT

of witness,

writing affecting, not to be proved by inferior evidence, 441.

how impeached,

by cross-examination, 908.

by proof of general character, 923.

particular acts inadmissible, *ib.*

mode of examining, 925.

how proof rebutted, *ib.*

by proof of contrary statement, *ib.*

but witness must be previously cross-examined on the point, 926.

and if statement in writing it must be shewn to witness, 929.

unless lost, 931.

whether witness may be asked generally as to different statement in a letter, 932.

statement must be relevant to issue, 938.

and witness may be re-examined as to other parts of statement, shewing his meaning and motive, 940.

but not as to another previous statement agreeing with his examination in chief, 944.

when a party may discredit his own witness,

by general evidence of bad character inadmissible, 902.

CREDIT—*continued*.

but contradiction as to material fact relevant to issue
admissible, 902.

by proof of contrary statement made by witness, 904.

CREDITOR

of bankrupt, incompetent witness to increase fund, 90.
or support fiat, *ib*.

unless he has assigned his debt, 119.

of insolvent debtor, incompetent witness to increase fund, 90.
unless he has assigned his debt, 119.

of testator or intestate competent for executor or administrator, 118, 119, and n. (2.)

CRIMEN FALSI,

conviction of incapacitates witness, 17.

what constitutes, *ib*.

CRIMES,

what incapacitate witness, 17.

sentence of foreign court as to, conclusive, 536.

sentence of ecclesiastical court as to, inadmissible, 548.

CRIMINAL CONVERSATION,

letters of wife, when admissible in action for, 201.

admission of adultery, renders proof of marriage unnecessary,
when, 377 n. (4.)

CROSS-EXAMINATION,

witness merely producing papers, not subject to, 908.

want of opportunity for, renders depositions inadmissible,
568, *et seq*.

rules as to, in criminal cases, 844 n. (4.)

as to competency, 885, 149.

leading questions allowable in, how far, 886, 912.

where witness unwilling, *ib*.

where willing, *ib*.

witness privileged from answering on, 913. And see tit.
Privilege.

does not give opposite party right to reply, though proving
new fact, 939.

unless additional evidence given, *ib*.

writing proved on, at what time to be put in, 940.

CROWN,

grant from, when presumed, 475.

CURTESY,

tenant by, incompetent as witness for party claiming *esorte*
materna, 92.

CUSTODY,

of documents, what the proper place of, 633.

CUSTOM. And see *Hearsay and Usage*.

of manor, may be proved by reputation, 251.

declaration of deceased copyholder admissible, 284.

of corporation, *ib.*

of manor, court rolls admissible in questions between copyholders, or copyholders and strangers, 376.

whence to be presumed, 474.

not to be presumed from custom of other manor, 483.

unless both formerly held under one lord, 484.

or one anciently parcel of the other, *ib.*

or manor within district subject to peculiar tenure, *ib.*

or custom laid as custom of the country, 485.

of parish as to tything, not to be presumed from custom in other parishes, 487.

regulating subject of written contract, admissibility of parol, of the country as to tenancy, 764.

of merchants,

meaning of warranty in policy, 767.

contract for seamen's wages, 768.

must not be inconsistent with contract, 769.

CUSTOM-HOUSE,

entry at, not conclusive as to property, 385.

presumption arising from, 471.

CUSTOM-HOUSE OFFICER

competent witness, though entitled to penalty, 139.

DAMAGES,

in action for, plaintiff entitled to begin, 836.

form of action immaterial if substantially for *tort*, *ib.*

laid, cannot be increased by amendment at *nisi prius*, 873.

DEAF AND DUMB.

when competent as witness, 4.

how examination taken, *ib.*

DEATH,

and time of, matter of pedigree, 225.

presumption of, from absence, 468.

of subscribing witness, renders proof of hand-writing admissible, 657.

manner of, in murder, proof of in substance sufficient, 850.

DEBT,

proof of less amount sufficient to support action of, 847.

DECLARATION

- of wife, as husband's agent admissible, 172.
 - as to cause of elopement, 206.
- accompanying possession, admissible as to nature of possession, when, 205.
- as to fact of possession, *ib.*
- of patient to medical man, 202.
- part of *res gestæ*, when, 206.
 - of bankrupt as to trading, 208.
 - or act of bankruptcy, *ib.*
 - of conspirator admissible against co-conspirator, when, 210.
 - when not, 212.
- collateral, 216.
- by deceased attesting witness, inadmissible, 221.
- family, in matters of pedigree. And see tit. *Hearsay*.
 - forms in which admissible, 227.
 - limitations within which admissible, 240.
 - of midwife or accoucheur, 244.
 - godmother, 245.
 - clergyman, *ib.*
- in matters of general interest, 250. And see *Hearsay*.
 - forms in which admissible, 261.
 - limitations under which admissible, 266.
 - post litem motam*, 272.
 - of persons in *pari jure*, 282.
 - of persons still living, 284.
- dying. See *Dying Declarations*.
- against interest. And see *Hearsay*.
 - relating to receipt of money, 311.
 - to occupation, 315.
 - right to property, *ib.*
 - must be against interest on the whole, 320.
 - not admissible for party claiming under declarant, *ib.*
 - may be verbal, 325.
 - parts of not affected by interest, admissible, *ib.*
 - but not where merely collateral, 328.
 - admissible, though declarant would have been incompetent, 329.
 - and though fact proveable by other evidence, 330.
 - character of declarant generally to be proved *aliunde*, *ib.*
- in course of duty, 333, *et seq.* And see *Hearsay*.
 - admissible though other evidence attainable, 340.
 - must be contemporaneous with fact inferred, 341.
 - and made in the ordinary course of business, 342.

DECLARATION—*continued.*

- inadmissible for party claiming under declarant, 344.
- of prisoner, accompanying restoration of property, admissible, when, 432.
- in cases of conspiracy and treason, admissible for him, when, 499.
- admissible though fact proveable by living witness, 440.

DECREE,

- admissible in proof of public right, when, 263, n. (2.)
- of foreign court, when conclusive, 532.
- of ecclesiastical court, when conclusive, 543.
- of court of equity, when conclusive, 556. And see *tit. Judgment.*
- how proved, 619.
- whole record must be produced, *ib.*
- unless where ancient, 620.

DEED,

- relating to client's title, attorney not allowed to disclose, 185.
- nor deed of composition, 186.
- execution of, attorney, attesting witness, not privileged as to, 186.
- whether as to erasure, 187, 188, n. (1).
- alteration of, attorney privileged from answering to, 188.
- or as to stamp, *ib.*
- fraudulent, declarations by grantor how far admissible as to, 207.
- recital in, admissible as evidence in cases of pedigree, 239.
- not against strangers, 230.
- descriptions in, admissible in matters of public right, 261.
- admission of, when may be proved without notice to produce, 364.
- operates as estoppel between parties, 386.
- as *prima facie* evidence, between party and stranger, 387.
- how far admissible for stranger against party, 388.
- receipt indorsed on does not operate as estoppel, 388.
- execution of, may be proved by one of several subscribing witnesses, 438.
- registered, memorial inadmissible to prove, 445.
- delivery of, when presumed, 470.
- how proved,
 - by attesting witnesses, 649.
 - exceptions to the rule,
 - deed thirty years old, 651.
 - extent of exception, 652.
 - seal of corporation, *ib.*
 - erasure, 653.

DEED—*continued.*

- witness known to be alive, 653.
- deed produced in pursuance of notice by party claiming under it, 655.
- attesting witness not forthcoming, 657.
 - dead, *ib.*
 - blind, *ib.*
 - insane, *ib.*
 - infamous, *ib.*
 - abroad, *ib.*
- illness of attesting witness, 658.
- absence of attesting witness, *ib.*
 - due inquiry for, what amounts to, *ib.*
- fictitious attesting witness, 660.
- unauthorized attesting witness, *ib.*
- attesting witness denying signature, *ib.*
 - identity how proved, 660.
- several attesting witnesses, 661.
- effect of proof of hand-writing of witness, *ib.*
 - whether identity of party need be proved, *ib.*
- n. (4).
- secondary evidence of, when admissible,
 - deed in possession of party using it, 662.
 - deed in possession of other party.
 - notice to produce, 662.
 - extent of rule requiring, *ib.*
 - effect of notice, 663.
 - what evidence of possession necessary, 664.
 - possession by privies, *ib.*
 - possession by independent party, *ib.*
 - form of notice, 665.
 - service of, on whom, *ib.*
 - within what time of trial, *ib.*
 - effect of non-production, 666.
 - deed called for but not used, 667.
 - deed inspected, 668.
 - time for demanding production, *ib.*
- notice to produce, when dispensed with, 668.
 - notice from proceedings, *ib.*
 - trover, 668.
 - theft, 669.
 - possession fraudulent, 670.
 - counterpart, 670.
 - deed in court in possession of other party, 671.
- not forthcoming according to notice, 673.

DEED—*continued.*

- destroyed, 674.
- privileged from production, *ib.*
- not found on inquiry, *ib.*
 - what sufficient inquiry, *ib.*
- what sufficient secondary evidence of,
 - when attesting witness must be called, 682.
- recital in other deed, 683.
- old copy, *ib.*
- abstract, *ib.*
- enrolment under 27 Hen. 8, 686.
- ancient, usage admissible in construction of, 747.
- parol evidence to vary or discharge, generally inadmissible, 753.
 - exceptions to rule,
 - want of consideration, 757, n. (3). And see *Estoppel*.
 - illegality, 758.
 - fraud, 759.
 - to shew different consideration consistent with deed, 761.
 - no consideration expressed, 762, and n. *
 - different use, 761.
 - delivery at different time, 763.
 - to shew custom regulating subject of deed, 764.
 - custom not inconsistent with deed, 769.
 - not admissible to shew subsequent alteration, 774.
 - nor to shew deed discharged, 776.
- registration of, how proved, 614, n. (5).
- variance in proof of, when fatal,
 - when tenor of deed set out, 858.
 - when substance stated, 859.

DEFAMATION,

- character not relevant inquiry, in action for, 488.
- other words spoken by defendant, admissible as to *animus*, 497.

DEFAULT,

- judgment by, effect as to competency of party as witness.
 - See tit. *Party and Witness*.

DEFENDANT. And see tit. *Party*.

- in civil suit, rendered competent witness for co-defendant, when
 - by judgment by default
 - in actions on contract,
 - generally remains incompetent, 50, 51.
 - n (2)
 - except where he cannot claim contribution, 52.
 - in actions on tort
 - becomes competent for co-defendant, 52.

DEFENDANT—*continued.*

- trover, trespass, ejectment, 53, 55.
- doubts as cases where but one assessment of damages, 53. and n (3) remains incompetent against co-defendant, 54.
- except in ejectment to prove possession, *ib.*
- by *nolle prosequi*
 - when entered to plea of bankruptcy and certificate renders defendant competent for co-defendant, 57.
- by separate verdict
 - allowed in actions of tort, where defendant unnecessarily sued, 58.
 - seldom allowed in actions, on joint contract, 56, 58.
- by striking name out of record,
 - allowed where defendant sued by mistake, 61.
- in criminal proceedings, rendered competent,
 - by *nolle prosequi*, 69.
 - by plea in abatement, and judgment in his favour, *ib.*
 - by separate verdict, *ib.*
 - by pleading guilty and paying fine, *ib.*
- not rendered competent by suffering judgment by default, 70.
- in equity suit, competent on issue directed, when, 142.
- in action for malicious prosecution, his evidence before grand jury admissible, 143.
- privilege of, not to be examined, 156.
 - when may be waived, 158.
- admission by, not evidence against co-defendant in tort, 399.

DELIVERY OF BILL

- does not amount to estoppel, 390.
- by attorney, not dispensed with by admission, *ib.*

DELIVERY OF DEED,

- when presumed, 470.

DELIVERY OF GOODS,

- may be proved by deceased servant, 336.

DEMAND

- of inspection of documents, 825.
- after tender, allegation of how supported, 849.

DEMURRER IN EQUITY

- does not amount to admission of charges in bill, 557.

DEMURRER TO EVIDENCE,

- what, 948.
- object of, 949.
- what it admits, *ib.* and n (3).
- how decided, 950.
 - decision, how appealed against, *ib.*
- how drawn up, 951.
- damages assessed conditionally, *ib.*

DEPOSIT

- of penalty, obligor for costs rendered competent by, 156.
- of deeds as security, attorney's knowledge as to date, &c. privileged, 181.

DEPOSITIONS

- on interrogatories,
- competency of witness cannot be objected to at trial, 149.
- in equity, admissible as evidence in matters of pedigree, 231.
 - unless post *litem motam*,
- before magistrate, not admissible against prisoner on other proceedings, 377.
- principle of admissibility as evidence, 560.
 - entire deposition must be received, 561.
- effect of in evidence, 561.
- must have been taken in judicial proceeding, *ib.*
- in equity bill and answer must be proved, 561.
 - except, when, *ib.*
- answers to cross interrogatories must be read also, 561.
- not admissible, unless suit regular, 562.
- de bene esse*, not admissible where witness dies before answer, 574.
 - or before witness can be examined again, 575.
 - unless defendant in contempt for not answering, 574.
- not admissible when witness living, though too ill to attend, 577.
- in ecclesiastical courts, 563.
- before magistrates on charge of felony, 563.
 - must be in writing, 566.
 - need not be signed by witness, 567.
 - several depositions, *ib.*
 - need not contain immaterial parts of statement, 567.
 - must be taken in presence of prisoner, 569.
 - unless witness resworn, *ib.*
 - admissible on different charge if transaction the same, 573.

DEPOSITIONS—*continued.*

- admissible when witness kept away by prisoner, 576.
 - on information for misdemeanor, 564.
- before coroner, 565.
 - whether admissible if taken in absence of prisoner, 570 and *n* (1).
- before commissioners of excise, admissible where witness dead, 568.
- of absent or infirm witness, 568.
- not admissible unless between same parties as in former suit, 568.
 - or between privies, 571.
 - or real parties, 572.
 - or where produced as hearsay evidence of reputation, 575.
 - or to contradict witness, 576.
- not admissible unless subject matter of suit same as in former suit, 573.
- when conclusive,
 - under bankrupt act, 576.
 - under mutiny act, *ib.*
- when admissible on account of illness of witness, 577.
 - or absence of witness, 578.
- how proved,
 - in equity, by examined copy, 629.
 - bill and answer to be produced, 628.
 - unless ancient suit, *ib.*
 - or defendant in contempt, *ib.*
 - or has had opportunity to cross-examine, 629.
 - or where order to read, 629.
- on interrogatories
 - commission to be produced, 629.
 - unless in ancient suit, *ib.*
- before magistrate,
 - by magistrate or clerk, 630.
 - or by proof of prisoner's handwriting, *ib.*
 - not if he only makes his mark, *ib.*
- at judge's chambers,
 - by copy made by clerk, 631.
- under excise laws, copy not allowable, 805.
- cross-examination upon, in criminal cases, rules as to, 844 *n* (4).

DEPRIVATION,

- sentence of, by visitor of college, conclusive, 553.
- by charity trustees, conclusive, 554.

DESCENT,

- course of, in manor proved by customary, 261.

DESCRIPTION,

- variance in,
 - in action of tort, 852.
 - where substance only stated, 860.
- of deed, effect of variance in, 858.
- of record, effect of variance, 859.

DETERMINATION,

- of complaint, judgment admissible to prove, 507.
- of right, 510.

DEVISE,

- parol evidence in construction of. See *Parol Evidence*.

DEVISEE,

- not competent to support will, 92.

DIPLOMA,

- not sufficient evidence of title to degree, 607.

DIRECTOR OF POOR,

- competency of, 48.

DISCHARGE

- under insolvent act, admission of not evidence, 365.
- of contract, when parol admissible as to, 776.

DISFRANCHISEMENT,

- of corporator, restores his competency as witness, 155.
- how obtained, *ib*.

DISTURBANCE OF COMMON,

- in action for, what sufficient proof of prescription, 858.

DIVORCE,

- presumption of bastardy arising from, 463.
- sentence of, by foreign court conclusive, when, 535.
 - when not, 536.
- effect of, in prosecution for bigamy, 549.

DOMESDAY-BOOK,

- nature of, 579.
- uses of as evidence, 580.

DOWER,

- widow entitled to, competent witness for heir-at-law, 93.

DRAWER OF BILL,

- in action against acceptor,
 - competent in general, for plaintiff or defendant, 125.

DRAWER OF BILL—continued.

- where accepted for accommodation of drawer,
formerly incompetent, 108.
- effect of, 3 & 4 W. c. 42, *ib.*
- contrariety of decisions thereon, 109—111.
- rendered competent by release, 152.

DRIVER

- of coach, incompetent for plaintiff, in action for injury to
coach, 101.

DUCES TECUM,

- effect of writ, 780.

DUPLICATE,

- originals, all must be accounted for before secondary evidence
allowed, 449, 662.
- may be proved without notice to produce, 670.

DYING DECLARATIONS,

- grounds of admissibility of, 291.
- whether admissible in any civil cases, 292.
- of attesting witness as to forgery, *ib.*
- in criminal cases,
 - admissible only where death of declarant subject of
charge, 294.
 - must relate to circumstances of death, *ib.*
 - inadmissible as to robbery, 295.
 - procuring abortion, *ib.*
 - or perjury, *ib.*
 - admissible though favourable to prisoner, *ib.*
 - must be made in contemplation of death, *ib.*
 - contemplation of death how ascertained, 297.
 - actual expressions unnecessary, *ib.*
 - within what time before death, 298.
 - rebutted by expressions of hope or re-
covery, 299.
 - or expectations of recovery held out by
others, 301.
 - need not be reduced to writing, 303.
 - but if written and signed not proved by parol, 304.
 - unless a distinct declaration, 303.
- admissibility of, question for the court, 304.
- to be received with caution, 305.

ECCLESIASTICAL COURT,

- judgment of. See tit. *Judgment.*

ECCLESIASTICAL COURT—*continued.*

- depositions in, when admissible, 563.
- proceedings in, how proved, 622. And see *Probate and Administration.*
- certificate of, 647.
- books of, 646.
- seal of, *ib.*

ECCLESIASTICAL SURVEYS,

- admissibility of,
- proof of commission unnecessary, 628.

EJECTMENT,

- production of written contract, if any, necessary to recovery in, 443.
- judgment in, how far conclusive in action for meane profits, 512.
- on trial of, which party entitled to begin, 839.
 - what admissions entitle party to begin, *ib.*
- description of place in, may be amended at nisi prius, 871.
- nature of title in, statement of not allowed to be amended at nisi prius, 873.
- defendant in, when competent against co-defendant,
 - after judgment by default, 54.
 - for co-defendant, 55.
- lessor, privileged from being witness against co-lessor, 158.
- tenant in possession, incompetent for defendant, 91.
- party to whom possession promised, incompetent for lessor, *ib.*

ELEGIT,

- title under, how proved, 632.

ENROLMENT

- of deed, presumption as to, 470
 - indorsement by officer, evidence of, 614.
 - copy of enrolment by clerk of peace inadmissible unless examined, 615.
- of bargain and sale of freehold under 27 H. 8.
 - copy of, evidence of deed, 686.
- of bargain and sale of term,
 - copy of, evidence against party acknowledging, 688.
 - not against other parties, *ib.*
- of annuity deed, examined copy of, evidence of memorial, when, 690.

ENTRIES

- in family Bibles, admissible in matters of pedigree, 229.
 - when proof, by whom made, necessary, 243.
- in parish register, as to time and place of birth inadmissible, 246.

ENTRIES—*continued*:

- unless made at request of relatives, 246, n. (1.)
- against interest
 - relating to receipt of money
 - by collector of taxes, 311.
 - by steward or bailiff, 312.
 - relating to occupation
 - in rate books, 315.
 - must be against interest on the whole, 320.
 - inadmissible for party claiming under maker, *ib.*
 - by executor, through whom real interest also claimed, admissible, 321.
 - and by proctors, also members of corporation, *ib.*
 - where entries of charge and discharge, both must be read, 321.
 - by parsons and vicars, admissible for their successors, 322.
 - parts of entry unaffected by interest admissible, 325.
 - by attornies, as to legal proceedings, 326.
 - by steward, as to ownership, *ib.*
 - by accoucheur, as to birth, *ib.*
 - by churchwardens, as to customary obligations, 327.
 - by attorney's clerk, as to tender, *ib.*
 - except where merely collateral
 - by sheriff's officer, as to place of caption, 328.
 - marginal note distinct from entry, 329.
 - admissible, though maker would have been incompetent, 329.
 - and though fact proveable by other evidence, 330.
 - but character of maker generally to be proved aliunde, 330.
 - unless document very ancient, 331, n. (2.)
 - or internal evidence very strong, 331.
- in public books may be proved by examined copies, 452, 638.
 - for what purposes admissible, 597, *et seq.*
 - And see *Book*.
- made in the course of duty or employment
 - by servant as to delivery of goods, 336.
 - by scrivener as to payment of mortgage money, 338.
 - by clerk as to payment of money, 338.
 - by attorney's clerk as to delivery of bill, 339.
 - by attorney as to service of notice to quit, *ib.*
 - by notary's clerk as to dishonor of bill, 340.
- admissible though other evidence available, *ib.*

ENTRIES—continued.

- must be made contemporaneously with act, 341.
- and in the ordinary course of business, 342.
- inadmissible for party claiming under maker, 344.
 - but entry of payment of interest by obligee or note admissible for representative, 345.
- shop book not evidence for tradesman, 350.
- containing admission, whole entry must be read, 359.
 - but not distinct entry, *ib.*
- in book accessible to both parties, amounts to admission, 375.
- in book of public company, do not amount to admission by member as individual, 376.
- at custom house, not conclusive of property, 385.
- admissible, though fact proveable by living witness, 440.
 - of deceased collector, 441.
- in books, of terms of deed not admissible, 444.
 - of record, parol evidence of inadmissible, 445.
 - oaths recorded under toleration act, *ib.*
 - day on which cause tried, *ib.*
 - record in augmentation office, *ib.*
- copy of not admissible to refresh witness's memory, 449.

EQUITY,

- proceedings in, effect of as evidence,
 - decree, 556.
 - bill, 557.
 - demurrer, *ib.*
 - plea, *ib.*
 - answer. See tit. *Answer.*
 - deposition. See tit. *Deposition.*

ERASURE

- in deed, whether attorney bound to answer as to, 187 and 188 n. (1.)
- renders proof of ancient deed by attesting witness necessary, 653.

ESCAPE

- of husband and wife in execution, proof of husband in execution sufficient, 847.
- in action for, judgment given for plaintiff, after special finding of omission to arrest, 874.

ESTOPPEL,

- doctrine of, how far applicable to admissions, 378.
- doctrine of, how far applicable to judgments, 509, 511.
 - to foreign judgments, 542.

EVIDENCE. See tit. *Witness, Hearsay, Presumption, Secondary Evidence, Parol, Writing, &c.*

admissibility of, a question for the judge, 2.

so also question of, fact necessary to determine admissibility,
but opinion of jury sometimes taken, 2 (n.)

suppression of, presumption arising from, 466.

fabrication of, presumption arising from, 467.

EXAMINATION. And see tit. *Deposition and Cross Examination.*

accompanying production of deeds, must be proved to establish admission, 358.

evidence, though part of deposition not included, 359.

in bankruptcy, evidence against examinant, 368.

before committee, evidence on misdemeanor, *ib.*

of witness before magistrate, not admissible against prisoner in other proceeding, 377.

of prisoner, reduced to writing, not to be proved by parol, 446.

statement made after examination, *ib.*

informal examination, 447.

de bene esse in equity, when admissible, 574.

before magistrate, copy of, matter of right, 804.

of witness, how to be conducted

as to competency

on *voire dire*. See tit. *Voire dire and Witness.*

in cross-examination, 885.

how far rule as to secondary evidence relaxed,
885.

separate examination of, when ordered, *ib.*

effect of disobedience of order, 886.

leading question, what, 886.

when allowed,

in suggestion, on failure of memory, 888.

introductory, if not conclusive, *ib.*

where witness unwilling, *ib.*

in contradiction of former witness, 889.

refreshing memory by memoranda, 891.

must be produced, when, 893.

where writing itself inadmissible, 894.

unstamped receipt, *ib.*

allowed, though not written by witness, when, 895.

at what time must have been made, 895.

copy inadmissible, 897.

when may be read to witness, 898.

evidence as to belief, *ib.*

identity, *ib.*

EXAMINATION—*continued*.

- handwriting, 898.
- opinion of witness
 - of medical man, 899.
 - of underwriters, *ib*.
 - of ship builders, engineers, &c., 901.
- when a party may discredit his own witness, 901.

EXCHEQUER,

- judgment of condemnation in, when conclusive, 551.
- of acquittal, whether conclusive, 552.

EXCISE. See *Commissioner*.

EXCISE BOOKS. See *Book*.

EXCOMMUNICATION,

- no ground of incompetency in witness, 13.

EXECUTION

- of deed, attorney attesting witness, not privileged as to, 186.
- or will, may be proved by one of several attesting witnesses, 438.
- when presumed, 470.
- how proved, 649.
- proof of when dispensed with, 651. And see tit. *Writing*.
- of writ
 - against husband and wife in action for escape how proved, 847.

EXECUTOR,

- residuary legatee incompetent for, to increase fund, 86
- specific legatee competent 117.
- annuitant competent 118.
- creditor competent 118, 119 and n. (2.)
- competent, if not beneficially interested or liable to costs, 119.
- or if suit relates to testator's real estate, 120.
- entry by deceased executor, through whom real interest also claimed, admissible, 321.
- judgment against testator binding on, 517.
- appointment of, proved by probate, 543.

EXEMPLIFICATION,

- of decree in equity, 619.
- of foreign judgment, 624.
- of letters patent, 689.

EXPENSES

- of witness,
 - in civil cases, 784:
 - tender of, when unnecessary, 785.

EXPENCES—*continued.*

- recompense for loss of time, 785.
- witness residing abroad,
 - in criminal cases,
 - tender of, not necessary,
 - except under 45 G. 3.
 - allowance of, under 7 G. 4, 788.

FACTOR. See *Agent*.**FACULTY,**

- when presumed, 474.

FALSE PRETENCE,

- obtaining money by, proof of part of pretence sufficient, 849.

FALSE REPRESENTATION,

- as to solvency, alleged insolvent competent to prove the fact,
121.

FALSE VERDICT,

- attaint of, incapacitates witness, 17.

FAMILY,

- acknowledgment by, admissible as to authenticity of matters
of pedigree, 243.
- repute in, admissible as matter of pedigree, *ib.*

FEAR,

- presumption of, in cases of robbery, 467.

FELONY,

- conviction of, incapacitates witness, 17.
- presumption of infant's incompetency to commit, 462.
- sentence of ecclesiastical court, not admissible in cases of, 548.
- depositions before magistrates in cases of, when admissible,
563.
- copy of indictment for, not obtained without order of court,
802.

FEME COVERT. See *Husband and Wife*.**FEME SOLE,**

- action by wife as, husband incompetent to prove marriage, 161.
- judgment against, binding on herself and subsequent husband, 517.

FENCES,

- presumption of, liability to repair, 474.

FILAZER'S BOOK,

- not admissible to prove writ, 631.

FILING

- of record, not to be disputed when produced by proper
officer, 506.

FINE,

defendant paying, competent witness, 69.
on inhabitant, unless paid, not admissible to prove district
within jurisdiction, 289.

assurance by,

proved by chirograph, 614.

but proclamations to be examined with roll, 615.

FISHERY,

ancient ownership of, how proved, 286, 290.

FLEET BOOKS,

inadmissible in proof of marriage,

FORCIBLE ENTRY,

on indictment for, under 21 Jac. 1, or 8 H. 6.

tenant incompetent witness for prosecution,
66.

at common law tenant competent, 130.

FORCIBLE MARRIAGE,

wife competent to prove, 169 and n. (3).

FOREIGN COURTS,

judgments of, when conclusive, 532. And see *Judgment*.

FOREIGN LAW

how proved, 624.

written law, 624.

unwritten law, 625.

of France, 627.

of Scotland, *ib.* n (1)

of Colony, 625.

of Spain, 626.

FOREIGN JUDGMENT,

when conclusive, 532.

how proved, 623.

if under seal, *ib.*

if not, 624.

by exemplification, *ib.*

FOREIGN STATE,

acts of, how proved, 626.

treaty of, 626.

FORGERY. See tit. *Handwriting*.

conviction of, incapacitates witness, 17.

on indictment for, prosecutor or party injured, competent as
witness, 65.

fraudulent intent, presumed, 463.

inspection of document for the purpose of detecting, 818.

belief of witness as to, from comparison of handwriting, how
far admissible, 696, 704.

FORGERY—*continued*.

of will, may be proved notwithstanding grant of probate, 544.

FRAUDULENT REPRESENTATION,

declarations of plaintiff, how far admissible 206.

FRAUDULENT CONVEYANCE,

declarations of parties, when admissible as to, 207.

FRAUD,

presumption of in cases of forgery, 463.

general presumption against, 464.

as to written instrument, admissibility of parol. See *tit. Parol Evidence*.

conviction of, renders witness incompetent, 17.

judgment impeached for, 550, 527.

FREEHOLD,

plea of, substance considered as proved, when, 846.

FREEMAN. See *Corporation*.**GAME LAWS,**

qualification under, to be proved by party claiming, 830.

GAMING

conviction of, under 9 Ann. c. 14, incapacitates witness, 18.

on indictment for, loser competent witness for prosecution, 67.

GAZETTE,

evidence of acts of state, 591.

not evidence in private matters, 592.

notice through, how proved, 593.

need not be shewn to come from King's printer, 639.

GENTOO,

how to be sworn, 10.

GODMOTHER

declarations of, inadmissible in matters of pedigree, 245.

GOVERNMENT

acts of, proved by Gazette, 591.

GOVERNOR OF THE POOR,

incompetent as witness on appeal against rates, if liable to costs, 49.

GOVERNOR OF COLONY,

official communications of, privileged from disclosure, 193.

GRAND JURY,

evidence taken by, whether privileged from disclosure, 194.

GRANT

from the crown, when presumed, 475.

to abbey, proper custody of, 633.

GUARANTEE

party primarily liable on, incompetent as witness for surety,
109. *Sed vide*, 112.

GUARDIAN

suing for infant, incompetent as witness, 48.
release by, will not render witness competent,
153.
admission by, not evidence against infant, 408.
evidence against guardian, *ib.* n (4).

HABEAS CORPUS

to compel attendance of prisoner as witness, 783.

HAND WRITING

of client, attorney not privileged from proving, 187.
may be proved without calling writer, 438.
of ancient document, need not be proved, 636.
of attesting witness, when allowed to be proved, 656.
proof of
in presence of witness, 690.
opinion of witness as to how acquired
from having seen party write, 692.
from other writings, having been acted on,
693.
identity must be proved, 694.
witness may refresh memory by looking at writing in his
possession, 694.
direct comparison of handwriting not allowed, 697.
jury may compare writings in evidence, 699.
if relevant to the issue, 700.
ancient writings proved by comparison, 701.
opinion of witness from signature purposely obtained,
insufficient, 703.

HAWKER AND PEDLAR

in action against for penalties, proof of negative averment on
plaintiff, 828.

HEARSAY,

definition of, 197.
what does not amount to,
words or writings, considered as transactions or as ground
of inference, 197.
what does not amount to,
letters to prove receipt of notice of fact, 197.
refusal to advance money, *ib.*

HEARSAY—*continued.*

what does not amount to,

demand made, 197.

explanatory of proceedings, *ib.*

charge made by defendant in action for libel,
corresponding to libel, 198.

letters containing opinions as to sanity of party,
ib.

false denial by wife or servant, *ib.*

instructions as showing intent, *ib.*

expressions being the matter in issue, 199.

reputed ownership, *ib.*

public rumour, *ib.*

character, *ib.*

opinion of spectators, 200.

declarations of intention by testa-
tor, *ib.*

letters or expressions indicative of contem-
porary mental feeling

wife's, as to husband's treatment
in *crim. con.* 201.

if without collusion, *ib.*

and before the adultery, *ib.*

expressions indicative of bodily feelings, 201.

patients as to health, 202.

as to cause of injury, 203.

complaint of prosecutrix in rape,
204.

declarations accompanying possession as indi-
cative of manner of possession, *ib.*

declarations inferring possession, 205.

words and writings considered as part of the *res gestæ*
when motives, &c. in question,

declarations accompanying giving credit, 206.

envelope, *ib.*

wife's declarations as to cause of elopement, *ib.*

declarations on execution of deed, 207.

bankrupt's declaration of intention in trading,
ib.

in act of bankruptcy, 208.

declarations of co-conspirators as to motives of
conspiracy, 211.

rule applicable to all injuries implying confe-
deracy, 215.

HEARSAY—*continued.*

- what does not amount to,
 - expressions collateral to the transaction inadmissible, 216.
- exclusion of, 217.
 - policy of the rule, *ib.*
 - extent of the rule,
 - where narrator dead, 221.
 - declarations of deceased attesting witness, *ib.*
- when admissible
 1. Matters of pedigree
 - ground of exception, 223.
 - what are, *ib.*
 - time of birth, death, or marriage, 225.
 - relationship, (*quære* as to dates) 224 n (4).
 - general kindred, 228.
 - what not
 - place of birth, 226.
 - non access, *ib.*
 - declarations as to parochial settlement, 227.
 - forms in which matter of pedigree admissible,
 - entries in Bibles, 229.
 - family correspondence, *ib.*
 - recitals in deeds
 - not against strangers, 230.
 - proceedings in equity, 231.
 - not if *post litem motam*, *ib.*
 - mourning rings, 232.
 - charts of pedigree, 233.
 - inscriptions on tomb stones or coffins, *ib.*
 - mural inscriptions, 235.
 - coat armour, *ib.*
 - herald's books, *ib.*
 - parish register, 236.
 - conduct of parties sometimes equivalent to declaration, 237.
 - declarations upon declarations, admissible, 239.
 - qualifications of hearsay in pedigree, 240.
 - limitation to relatives, 242.
 - principle of limitation, *ib.*
 - what cases within limitation, *ib.*
 - declaration of husband as to wife's legitimacy, 243.
 - repute in family, 243.

HEARSAY—*continued.*

when admissible, pedigree,

public acknowledgment by family, 243.
 declaration of midwife or accoucheur,
 244.

declaration by godmother, 245.

by clergyman, *ib.*

entry in register as to birth, 246.

unless made as at request of relatives, *ib.* n (1).

relationship of declarant to be proved *aliunde*,
 247.

declaration and fact to be proved need not be contemporaneous, 249.

must be *ante litem motam*, 272.

may be made by persons in *pari jure*, 283.

other rules as to pedigree, 249.

2. Matters of general interest,

ground of exception,

what may be proved or disproved by reputation,
 251, 265.

public prescriptive rights, 251.

manorial custom, *ib.*

modus, *ib.*

parochial boundary, *ib.*

custom of corporation, *ib.*

jurisdiction of court, *ib.*

rights of common, *ib.*

district modus, 252.

farm modus, *quare* as to, 253.

whether private prescriptive rights, *ib.*

what not

private rights not prescriptive, 255.

private boundary, *ib.*

private title, 256.

presentation, 257.

particular facts,

what are such, 258.

what not, 259.

perambulations, *ib.*

forms in which hearsay of reputation admissible,

descriptions in ancient deeds, 261.

manorial documents, *ib.*

maps of manors or parishes, 262.

HEARSAY—*continued.*

when admissible, matters of general interest,

verdicts or decrees, 263 and n (2).

when verdict inadmissible, 264.

limitations within which admissible,

by whom to be made,

in questions of public right, by all persons, 266.

in questions of general nature, by persons of neighbourhood, 267.

but actual habitancy not necessary, 268.

or proof *aliunde* of capacity, 269.

proof of modern enjoyment, necessary when, 270.

when not, 271.

post litem motam generally inadmissible, 272.

definition of *lis mota*, 276.

inadmissible, though fact unknown to declarant, 277.

award on same subject, 278.

presentment of homage, *ib.*

admissible where subject of controversy different, 279.

unless subject of declaration litigated, 280.

admissible if made to prevent disputes, 281.

by persons *in pari jure* admissible, 282.

parishioners in questions of boundary, *ib.*

occupiers in questions of modus, *ib.*

customary tenants, as to manorial customs, 284.

3. Hearsay in proof of ancient possession.

ground of exception, 285.

ancient documents admissible as to ownership, when, 286.

leases, 286.

licenses of lord, *ib.*

rent-rolls, *ib.*

maps annexed to deeds, 288.

limitations within which admissible

must be shewn to have been acted on, when, 289.

always if *post litem motam*, 290.

or be supported by modern possession or user, *ib.*

4. Dying declarations,

grounds of admissibility, 291.

HEARSAY—*continued.*

when admissible, dying declarations

whether admissible in any civil cases, 292.

of attesting witness as to forgery, *ib.*

in criminal cases

admissible only where death of declarant subject of charge, 294.

must relate to circumstances of death, *ib.*

inadmissible as to robbery, 295.

procuring abortion, *ib.*

or perjury, *ib.*

admissible though favourable to prisoner, *ib.*

must be made in contemplation of death, *ib.*

contemplation of death how shewn, 297.

actual expressions unnecessary, *ib.*

within what time previous to death, 298.

rebutted by expressions of hope of recovery, 299.

or expectation of recovery held out, 301.

not necessary to be reduced to writing, 303.

but if written and signed cannot be proved by parol, 304.

admissibility of question for the judge, *ib.*

to be received with caution, 305.

5. Declarations against interest

principle of exception, 307.

relating to receipt of money,

entries by collector of taxes, 311.

by steward or bailiff, 312.

entitled to more credit when delivered to persons for whom money received, 313.

receipts, *ib.*

relating to occupation,

entries in rate books, 315.

relating to right to property,

declaration by former owner,

by master of ship, 316.

occupier, *ib.*

wife as to husband's estate, 318.

by former tenant for life as to power to lease, 319.

must be made during possession, 319.

not admissible unless against interest on the whole, 320.

entries, &c. by party claimed through, inadmissible, *ib.*

by executor through whom interest in land also claimed, admissible, 321.

HEARSAY—*continued.*

- when admissible, declarations against interest,
 - by parties also members of corporation, 321.
 - entries of charge and discharge, the whole must be read, *ib.*
 - entries made by parsons and vicars, admissible for their successors, 322.
 - must contain receipt for money, 323.
 - declaration may be verbal, 325.
 - parts of not affecting interest of declarant, admissible when, *ib.*
 - circumstances of payment, *ib.*
 - entries by attornies, as to legal proceedings, 326.
 - stewards, as to ownership, *ib.*
 - accoucheur, as to birth, *ib.*
 - churchwardens, as to customary obligation, 327.
 - attorney's clerk as to tender, *ib.*
 - not admissible where merely collateral
 - by sheriffs' officer as to place of caption, 328.
 - marginal note distinct from entry, 329.
 - admissible, though declarant would have been incompetent, 329.
 - and though fact proveable by other evidence, 330.
 - character of declarant to be proved *aliunde*, 330.
 - unless where documents of great antiquity, 331 n. (2.)
 - or internal evidence very strong, 331.
- 6. Declarations in the course of duty or employment,
 - principle of exception, 333.
 - by servant, of delivery of goods, 336.
 - by scrivener, of payment of mortgage, 337.
 - by clerk, as to payment of money, 338.
 - by attorney's clerk, as to delivery of bill, 339.
 - by attorney, as to service of notice to quit, *ib.*
 - by notary's clerk, as to dishonour of bill, 340.
 - admissible, though other evidence available, *ib.*
 - must be contemporaneous with act to be inferred, 341.
 - and in the ordinary course of business, 342.
 - inadmissible, for parties having privity of interest with declarant, 344.
 - but indorsement of interest paid, by obligee or payee admissible for representative, 345.
 - shop books not evidence for tradesman, 350.
- 7. Other exceptions to the rule against hearsay,
 - facts ascertained by authority, 352. See *Inquisition.*
 - official statements, *ib.*
 - statutory exceptions, *ib.*

HEARSAY—*continued*.

when admissible

evidence of deceased witness on former trial,

admissible where parties and subject of suit the same,
353.

or if witness absent from contrivance, *ib*.

or if parties different, if privies in law, blood, or estate,
354.

when the exact words used by witness material, *ib*.

hearsay evidence of admissions and confessions. See those

Titles contained in Admission how far admissible, 363.

HEATHEN

admissible as witness, 12.

how sworn, 10.

HERALD'S BOOKS,

when evidence in matters of pedigree, 236, 583.

HERALD'S OFFICE,

ancient writing from, as to abbey lands, inadmissible, 634.

HIGHWAY,

property in soil, presumed from abuttal of land, 472.

judgment against parish for non-repair of, when evidence for
another parish, 520.

act, in indictment under, inhabitant competent witness, 134.

HISTORY

admissible to prove public matter, 605.

to prove national custom, 606.

inadmissible as to private rights, *ib*.

HOLDER,

prior holder of bill, admission by, when evidence, 415.

not where endorsed before
due for value, 416.

HOMICIDE,

malice presumed from, unless rebutted, 464.

HONORARY ENGAGEMENT,

witness not incapacitated by, 123.

HOUSE OF COMMONS. See *Journals, Committee*.**HUNDRED,**

in action against, under stat. Winton, party robbed competent
witness, 133.

and inhabitant of hundred, *ib*.

HUSBAND AND WIFE

incompetent generally as witness for each other in civil cases,

husband, to prove property in wife's trustees, 159.

to prove reversion in wife, *ib*.

HUSBAND AND WIFE—*continued.*

incompetent for each other,

wife of bail, for party, 159.

of bankrupt, to prove bankruptcy, *ib.*

criminal cases

wife, for another charged with joint offence with
husband, 160.

or against each other

civil cases,

husband, to prove marriage, in action by wife
as *feme sole*, 161.

criminal cases,

bigamy, husband, to prove first marriage, *ib.*

conspiracy to procure marriage, husband, to
prove the marriage, *ib.*

treason, wife, against husband, *ib.*

theft, wife, against another for theft in which husband
concerned, *ib.*

incompetency arising after service of *subpoena*, 162.

whether wife may be examined by consent of husband, *ib.*

extent of the rule, 162.

competent on collateral proceedings, not directly affecting each
other, 161.

cases of settlement to prove prior marriage, 162.

actions between third parties, wife to prove husband
liable, 167.

incompetency of, when continues after termination of cover-
ture,

parliamentary divorce, previous conversations inadmis-
sible, 168.

widow, *ib.* and n (2.)

incompetent to prove deceased's husband's admission, *ib.*

wife having separate maintenance, *ib.* n (1.)

wife incompetent to prove non-access, 169. and n (1.)

competent in certain cases from necessity,

forcible marriage, 169, n (3.)

rape, 170.

assault, *ib.*

malicious shooting, *ib.*

poisoning, *ib.* n (3.)

breach of the peace, 170.

husband's credibility, wife competent as to, *ib.* n (2.)

bastardy, wife competent to prove the adulterous inter-
course, 171.

malicious prosecution, evidence of defendant's wife on
trial, admissible, 171. n (4.)

HUSBAND AND WIFE—*continued.*

- declaration of wife as husband's agent, admissible, 172.
- bigamy, second wife competent to prove, *ib.*
- woman passing as wife, not incompetent, 173.
 - marriage cannot be disputed by pretended husband, 381.
- declaration of husband as to wife's legitimacy, admissible in matters of pedigree, 243.
- admission by wife, when evidence against husband, 408.
- execution against, what proof sufficient to establish fact, 847.
- what sufficient proof of averment of lease by, 859.
 - of bond given to, *ib.*
- declarations of wife, when admissible for or against husband, in *crim. con.*, 201—206.

IDENTITY

- of prisoner, rule requiring confirmation of an accomplice's evidence as to, 33.
- of party to suit, attorney not privileged from proving, 187.
- of writer, when necessary to confirm proof of handwriting, 694.
- belief of witness as to, admissible, 898.

IDIOT

- incompetent as witness, 4.

ILLEGITIMACY. See tit. *Legitimacy.***IMPLICATION,**

- admissions by, 368.

INCOMPETENCY

- of witness. See tit. *Witness.*

INCORPOREAL RIGHTS,

- presumption of, from usage, 473.

INCUMBENCY,

- acting as parson, admission of, 370.

INDEMNITY,

- party giving, admissions of, receivable against party indemnified, 396.

INDENTURE OF APPRENTICE,

- what sufficient inquiry for, to admit secondary evidence, 679.

INDIA

- evidence of witness in, how obtained, 795.

INDICTMENT,

- when order to inspect necessary, 802.
- felony, *ib.*

INDICTMENT—*continued.*

when not

treason, 803.

misdemeanor, 803.

substance of proved, sufficient, 894. And see tit. of *respective Offences.*

unnecessary averments, in need not to be proved, 854.

what so considered, *ib.*

INDORSEE,

indorser competent witness for or against, 125.

admission of payee, inadmissible against, when, 416.

INDORSEMENT. And see *Enrolment.*

of witness's name on record, effect of, 77.

by deceased obligee, &c. on bond, note, &c. of payment of interest, admissible for representatives, 345.

but such indorsement ineffectual as to Stat. of Limitations, 348, n. (2).

before bill due, averment of, supported by proof of indorsement after, 852.

INDORSER,

being payee, competent to prove invalidity of bill, 41.

in action by indorsee, competent for plaintiff or defendant, 126.

where bill drawn for his accommodation,

competent for plaintiff, 126.

whether incompetent for defendant, 109—111.

admissions of, when evidence against indorsee, 415.

INDUCEMENT,

confession invalidated by, when, 428.

by constable, 429.

prosecutor, 430.

strangers, *ib.*

objection arising from, how removed, 430.

in pleading, rule as to proof of, 852.

INFAMY,

legal, what constitutes, 14.

conviction of, renders incompetent as witness, 14.

ground of incompetency, 15.

what offences incapacitate, 17, *et seq.*

extent and effect of disability, 19.

how proved, 19.

cannot be admitted, *ib.* 365.

competency how restored, 20.

of attesting witness, renders proof of handwriting admissible, 657.

INFANCY,

proof of, rests on party asserting, 831.

INFANT,

- competent, when, 5.
- declaration of without oath, inadmissible, 6.
- evidence in confirmation of, 6.
- admission of guardian not admissible against, 408.
- guardian incompetent witness for, when, 48.

INFERIOR COURT,

- jurisdiction of, not to be presumed, 471.
- judgments of, how far conclusive, 525.
 - how proved, 622.
 - when record lost, 617.
- proceedings of, inspection when ordered, 805.

INFIDEL.

- when admissible witness, 12.

INFORMATION

- before magistrate, inspection and copy of, when ordered, 806.

INFORMER

- admissible as witness in cases of conspiracy, 39.
 - in cases of coining, &c., 40.
- on summary convictions, incompetent when entitled to part of penalty, 66.
 - except where court has discretion to substitute imprisonment, 68.
- competent witness under statute against exporting machinery, 132.
- employed by government, communications of, how far privileged, 189.

INHABITANT

- of parish, &c., if rated, incompetent as witness, 50, 94.
 - if not actually rated, competent, *ib.* 94.
- rendered competent by statute, when,
 - on indictment for non-repair of bridge, &c., 133.
 - in action against hundred under stat. Winton, 133.
 - for riotous assembly, *ib.*
 - against churchwarden, &c., for misapplication of funds, 134.
- on summary conviction under 7 & 8 G. 4, c. 29 and 30, *ib.*
- on indictment under general highway act, *ib.*
 - under turnpike act, 135.
- in matters relating to rates and cesses, *ib.*
 - what deemed to relate to rates, 136.
 - what not, 137.
 - contradictory decisions considered, 138 n.(3)
- privilege of, from being witness against parish, 158, 915.

INHABITANT—*continued*.

deceased, declarations by, admissible in questions of boundary or modus, 283.

admissions of, how far evidence against parish, 395.

INNOCENCE,

general presumption of, 464.

INQUEST,

coroner's, inadmissible as evidence in civil cases, 522.

INQUISITION,

nature of, 578.

principle of admissibility, 579.

domesday-book, 579.

post mortem, 580.

effect of, 582.

by heralds, 583.

of lunacy, *ib*.

by warrant of court of exchequer, 384.

by order of house of commons, *ib*.

by sheriff without writ, whether admissible, 584.

by coroner, 585.

not conclusive, 585.

valor beneficiorum of Pope Nicholas, 586.

of 26 H. 8., *ib*.

parliamentary survey, 587.

how proved, 628.

INQUISITIONES NONARUM,

effect of, as evidence, 587.

INROLMENT. See tit. *Enrolment*.

INSANITY. See tit. *Lunacy*.

INSCRIPTION

on banner, when admissible in cases of treasonable conspiracy, 214.

how proved, 450.

notice to produce unnecessary, 470.

on rings, tomb-stones, coffin-plates, walls, &c., evidence in matters of pedigree, 232.

when necessary to shew by whom made, 244.

on coach, evidence of ownership, 390.

INSOLVENT,

omission of debt in schedule, admission that not due, 377.

but not conclusive, 385.

INSOLVENT DEBTOR'S COURT,

discharge by, cannot be established by admission, 365, 377.

INSPECTION

- of documents produced under notice, effect of, 668.
 - of records, generally matter of right, 802.
 - when order of court necessary, *ib.*
 - indictment for felony, *ib.*
 - not in cases of misdemeanor, 803.
 - nor in convictions by magistrates, 803.
- of public documents,
 - of examinations before committing magistrate, 804.
 - of depositions under excise laws, not allowable, 805.
 - of report on which criminal information founded, *ib.*
 - of proceedings in custody of officer of superior court, 805.
 - of proceedings of inferior court, *ib.*
 - in court of conscience, 806.
 - of commissioners, *ib.*
 - of information before magistrate, *ib.*
 - of parish registers and other public books, 806.
 - of books of public office, not allowable in collateral actions, 807.
 - of rolls of manor, allowable for tenants, *ib.*
 - under particular statutes, 808.
- of public documents,
 - allowable only where applicant has interest and control in
 - subject of documents, 808.
 - bishop's register, *ib.*
 - parish books, 809.
 - county rate book, *ib.*
 - court rolls, 810.
 - corporation books, *ib.*
 - bye-law, 811.
 - exposing party to criminal charge not compelled, 812.
 - but *quo warranto* not so considered, 813.
 - of public document, for private object not compelled, 814.
 - how obtained, 814.
 - when application for to be made, *ib.*
 - in action, 815.
 - in proceeding by mandamus, 815.
 - in *quo warranto*, *ib.*
 - where no action pending, *ib.*
- of private documents
 - of writing on which action or defence founded, 817.
 - discretion of court as to, *ib.*
 - inspection required for plea in abatement, *ib.*
 - to detect forgery, 818.
 - of instrument of which no counterpart, 819.

INSPECTION—*continued.*

- where originally two parts of instrument inspection not allowed, 819.
- by whom allowable,
 - party to suit, 820.
 - party in interest, *ib.*
- against what parties ordered,
 - party to suit, 821.
 - person obtaining possession from party, *ib.*
- directed by statute,
 - policies of insurance, 822.
 - annuity deeds, *ib.*
- discretion of court as to, in other cases, 823.
- refusal to allow, whether ground for staying proceedings, 824.
- imposition of terms as to, *ib.*
- where no suit court has jurisdiction,
- what sufficient excuse for non-production, 825.
- order for, how obtained, 825.
- how enforced, *ib.*

INSPEXIMUS,

- of enrolment, when admissible in proof of deed, 687.
- of letters patent, admissible, 689.

INSTRUCTIONS,

- from client to attorney, privileged, 180.

INSURANCE. See *Policy.*

INTENTION,

- declarations of testator, when admissible as to, 200.
- fraudulent, when presumed, 464.
- presumption of, from previous transactions, 482.
- in criminal cases, when presumed from commission of other offences, 494.

INTEREST,

- incompetency of witness from. See tit. *Witness.*
- how removed, 151.
- direct and indirect, distinction between, 74, *et seq.*
- effect of 3 & 4 W. 4, c. 42, as to, 108.
- of attesting witness, effect of, 657.
- objection as to, when and how to be taken, 884, 148.

INTERPRETER,

- communications made through, between attorney and client privileged, 175.
- admissions made through, evidence without calling interpreter, 406.

INTERROGATORIES,

for examination of witness abroad, under 1 W. 4, c. 22, 797.

INTESTATE,

admissions of, evidence against administrator, 312.

judgment against, binding on administrator, 517.

INVENTORY,

not admissible in proof of assets, 389.

INVOICE,

when considered as conclusive against party making it, 390.

IRISH JUDGMENT,

whether conclusive, 542.

IRRELEVANT QUESTION.

ISSUE,

proof of, on whom, 827. See *Onus Probandi*.

what sufficient proof of. See tit. *Substance and Variance*.

from Chancery, bill of exceptions not allowed on, 948.

JACTITATION OF MARRIAGE,

sentence in suits for, not conclusive against strangers, 544.

effect of, 546.

inadmissible in criminal cases, 548.

JEW,

how to be sworn, 10.

but if sworn as a Christian, oath considered binding, 11.

JOURNALS,

of house of lords, evidence of judgment, 591.

how proved, 618.

of houses of lords and commons, evidence of proceedings, 591.

of public transactions, *ib.*

how proved, 638.

JUDGE,

judgment of, not examinable in action against him, 555.

except on the ground of want of jurisdiction, *ib.*

JUDGMENT

proof of, necessary to incapacitate witness on the ground of infamy, 20.

reversal of, renders infamous witness competent, *ib.*

by default, effect of, in rendering defendant competent witness

for co-defendant. See tit. *Defendant*.

assignment of, how proved, 614, n. (5), 690.

effect of, as evidence,

of superior court,

cannot be contradicted, 506.

JUDGMENT—*continued.*

- except as to immaterial averment, 506.
- admissibility and effect of,
 - conclusive as to fact of judgment, 507.
 - to shew complaint determined, *ib.*
 - evidence admissible, to disprove connection between judgment and complaint, *ib.*
 - recovery on different claim, *ib.*
 - recovery on part of claim, 508.
 - or to prove such connection, 509.
 - identity of complaint whence inferred, *ib.*
 - conclusive though not pleaded as estoppel, *ib.*
 - to shew right determined,
 - conclusive when pleaded by way of estoppel, 510.
 - otherwise not, *ib.*
 - must relate to same subject matter, 512.
 - or same point essential to first finding, 513.
 - admissible though form of action different, 514.
 - must be between same parties, *ib.*
 - or parties really interested, 515.
 - justification under same party, *ib.*
 - cognizance under same party, 516.
 - real party in ejectment, 516.
 - and in same character, 517.
 - or between privies,
 - in blood, *ib.*
 - in law, *ib.*
 - lord claiming by escheat, *ib.*
 - tenant by curtesy, *ib.*
 - tenant in dower, *ib.*
 - incumbent, *ib.*
 - intestate and testator, *ib.*
 - woman *dum sola*, 518.
 - schoolmaster of hospital, *ib.*
 - party through whom officer claimed, *ib.*
 - in estate,
 - remainder man and next in remainder, 519.
 - reversioner and lessee, *ib.*
 - reversioner and tenant for life, *ib.*

JUDGMENT—continued.

of superior courts,

claim must be acquired after
first verdict, 529.

admissible though privy a witness
in first suit, 520.

against principal admissible against accessary, when,
520.

against another parish, *ib.*

in criminal cases,

inadmissible in civil action, 520.

unless where plea of guilty, 523.

in penal action, admissible in civil suit, *ib.*

of acquittal,

inadmissible unless for same offence, 524.

though same right in litigation,
523.

how proved, 615.

of inferior courts,

how far examinable, 525.

where due notice not given of pro-
ceedings, 527.

or fraud apparent, *ib.*

for other causes, 528.

after judgment by default and re-
moval of cause to superior court,
528.

of quarter sessions on appeals against orders
of removal, 529.

how far conclusive, *ib.*

where order quashed,

effect as to appellant parish, *ib.*

as to respondent, 530.

only *prima facie* evidence of set-
tlement, *ib.*

grounds of, may be proved by
parol evidence, *ib.*

where order confirmed,

conclusive, as to settlement at time
of removal, 531.

how proved, 622.

of foreign courts,

in questions of real property, 532.

in cases of prize, *ib.*

generally conclusive, 533.

JUDGMENT—*continued.*

of foreign courts,

when not, 534.

when no special ground stated, *ib.*

when insufficient ground stated, *ib.*

when statement of grounds ambiguous, 535.

how court must be constituted, *ib.*

in questions of marriage,

when conclusive, 535.

when not, 536.

invalid, if pronouncing divorce of English marriage of English subjects, *ib.*

in criminal questions, 536.

how far conclusive, in action on the judgment, 537.

may be impeached for manifest error, 538.

or if contrary to justice, *ib.*

where defendant not summoned, *ib.*

form of judgment not considered, 541.

not conclusive, unless so, where pronounced, 542.

Irish judgment whether impeachable, *ib.*

how proved, 623.

of ecclesiastical court,

where jurisdiction exclusive, judgment generally conclusive, 543.

grant of probate, *ib.*

but examinable, if forgery alleged, 544.

or jurisdiction contested, *ib.*

sentences in matrimonial suits,

between strangers to suit,

not conclusive, *ib.*

unless where proceeding *in rem*, 545.

legality of marriage originally examinable by temporal courts, 548.

not evidence of collateral fact to be inferred, 545.

effect of sentence in jactitation suit, 546.

inference from probate, 547.

not evidence of death, *ib.*

admissible against parties though on subordinate question, 548.

not admissible in criminal cases,

provision of 9 G. 4, c. 31, as to divorce in cases of bigamy, 549.

probate, not conclusive against forgery of will, *ib.*

JUDGMENT—*continued.*

- of ecclesiastical court,
 - impeachable for fraud, 550.
 - how proved, 622.
- of court of admiralty,
 - when conclusive, 551.
- of court of exchequer,
 - when *in rem*, conclusive, though no notice of action, 551.
 - and upon stranger to suit, 552.
 - when in *personam*,
 - not conclusive on stranger, 552.
 - not admissible as to offence under different statute, 552.
 - of acquittal, whether conclusive, 552.
- of commissioners of excise, 553.
- of commissioners for settling army debts, *ib.*
- of visitors of college,
 - generally conclusive, 554.
 - but may be impeached for excess of jurisdiction, *ib.*
 - but not for irregularity, *ib.* n. (4).
- of charity trustees, 554.
- of courts martial, 554.
- of arbitrators, 555.
- in equity. See tit, *Equity*.
- of house of lords, how proved, 618.
- how proved,
 - on issue of *nul tiel* record, 612.
 - record of same court, *ib.*
 - of another superior court, *ib.*
 - of an inferior court, *ib.*
 - for other purposes,
 - by copy under seal of court, 612.
 - by examined copy, 615.
 - how copy to be examined, *ib.*
 - judgment paper not admissible, 616.
 - nor judgment book, *ib.*
 - nor prothonotary's book, *ib.*
 - nor minutes of quarter sessions, *ib.*
 - but minutes of court under same commission admissible, 617.
 - by presumption, when record lost, 617.
 - when lost, 617.
 - variance in proof of, when immaterial, 861.

JURISDICTION,

- of court, prescription as to, may be proved by reputation, 251.

JURISDICTION—*continued.*

of inferior court, not to be presumed, 471.

grant of probate, not conclusive as to, 544.

of foreign court, must be proved, 535.

JUSTICE OF PEACE—See tit. *Quarter Sessions, Deposition, Confession, &c.*

JUSTIFICATION,

in assault, substance of issue proved when, 847.

KILLING. See *Death, Homicide.*

KINDRED,

general, matter of pedigree, 228.

KING

must be sworn, if witness, 8.

conveyances by, public evidence, 593.

sign manual of, 594.

address from lords to, when evidence, 590.

proclamation of, when evidence, 591.

how proved, *ib.*

grant from, when presumed, 475.

attempt on life of. See *Treason.*

LANDLORD,

statement in former lease, evidence for, 413.

judgment against bailiff, admissible against, 516.

LARCENY,

presumption of, from possession of property, 466.

conviction of, renders witness incompetent, 17.

on indictment for, owner of stolen goods competent, 67.

wife of party concerned in, incompetent for
prisoner, 161.

prisoner may be convicted of, under indictment for burglary
or robbery, 849.

of writings, notice to produce the writings unnecessary, 669.

LAW. See *Foreign Law, Bye Law.*

LEADING QUESTION,

what is, 886.

when allowed on examination in chief,

in suggestion on failure of memory, 888.

introductory, if not conclusive, *ib.*

where witness hostile, *ib.*

LEADING QUESTION—*continued.*

where preparatory to contradiction of former witness, 889.

how far allowed on cross-examination of friendly witness, 912.

LEASE,

attorney of lessor bound to produce, when, 186.

ancient, evidence of possession, when, 286.

of tithes, how far necessary to prove possession, 289,
n (2).

parol evidence inadmissible in construction of, when

as to time of holding, 754.

unless lease by parol, *ib.* n (3).

as to additional rent, 771.

as to indemnification against taxes, *ib.*

parol evidence admissible in construction of, when

to shew custom of country regulating subject
of lease, 764.

compensation for out-going crop, &c.
ib.

method of tillage, *ib.*

averment of when supported by proof of different lease, 848,
859.

of duchy lands, enrolment how proved, 614.

LEAVE AND LICENCE. See tit. *Licence, and Consent.*

LEDGER BOOK

when admissible to prove will, 646.

LEGAL ESTATE

conveyance of, to beneficial owner, when presumed, 475.

LEGATEE

residuary, incompetent witness to increase fund, 86.

when release renders competent, 152.

specific, competent to increase fund, 118.

competent to prove will when legacy paid or re-
leased, 144. 151.

LEGITIMACY

presumption of, from birth after marriage of mother, 462.

how rebutted, *ib.*

wife's, husband's declaration as to, admissible as matter of pe-
digree, 243.

sentence of nullity or affirmance of marriage, when conclusive
as to, 545 n (1).

declarations of parents as to legitimacy, how far admissible-
227.

LEGITIMACY—*continued.*

declarations of clergyman as to marriage inadmissible, 245.

And see *Hearsay n Pedigree.*

LESSEE

judgment for or against, admissible for or against reversioner,
519.

LESSOR

of concurrent terms, competent to prove which prior, 123.

one of several in ejectment, privileged from being witness,
158.

of plaintiff, judgment in ejectment admissible for or against,
517.

in ejectment, privileged from being called against co-lessor,
158.

LETTER,

when may be given in evidence without calling writer, 197,
439.

as proof of notice of facts, *ib.*

of refusal, *ib.*

of collateral fact to be inferred, 198.

of opinions of writer, *ib.*

of feelings of the writer, 201.

as part of *res gestæ*, when, 206,

in cases of conspiracy, 210.

family, admissible as matter of pedigree, 229.

admission contained in

other letters referred, to be produced, when, 858. n (1)

letter to which admission an answer, 359.

referred to by answer in equity, 360.

unanswered letter does not amount to, 374.

used to discredit witness, not to be proved by inferior evidence,
442

putting in the post, presumption of receipt of, 471.

ancient, how proved, 652.

secondary evidence of, what sufficient, 681.

contract contained in several, parol admissible as to, 773.

of conspirator, when evidence against co-conspirator, 210. 434.

on which witness cross-examined to shew contrary statement,
must be produced, 929.

unless lost, 931.

cannot be proved without previous cross-examination,
932.

LETTERS OF ADMINISTRATION. See *Administration.*

LETTERS PATENT

exemption of, 689.

LIABILITY OVER,

incompetency from. See tit. *Witness*.

LIBEL,

that subsequent charge made by defendant corresponding with libel, admissible evidence, 198.

expressions of spectators, evidence of effect of libellous picture, 200.

publication of, presumed from sale by servant, 466.

other publications of defendant, admissible to prove animus, 497.

on trial of, plaintiff always begins, 836.

charge of composing, &c. supported by proof of publishing, 849.

copyist of, not bound to answer question as to that fact, 914.

LIBRARY,

Bodleian, Brit. Mus., &c.

MSS. produced from, not admissible, 633.

LICENCE,

ancient licence of lord, when evidence of manorial rights, 286.

when presumed, 478, 617.

of Pope, when admissible, 594.

LIS MOTA

definition of, 276.

renders declarations in matters of pedigree and general interest inadmissible, when, 277.

when not, 279.

renders possession or user necessary to support ancient writing, 290.

LIVERY OF SEISIN,

when presumed from possession, 478.

LLOYD'S BOOK,

evidence of capture, 598.

LOSS

of ship, when presumed, 469.

total, allegation of, supported by proof of partial, 847.

of deed, when presumed, 674.

what sufficient to raise presumption of, 675.

of record, presumption of, how raised, 617.

of writ, *ib*.

LUNACY

renders incompetent as witness, 4.

with lucid interval competent, when, 5.

inquisition of, admissible, 584. And see *Inquisition*.

of attesting witness, renders proof of handwriting admissible, 657.

LUNACY—*continued*.

opinion of medical witness admissible as to, 899.
not as to sanity of act in question, *ib.* n.

MAGISTRATE,

confession made to. See *tit. Confession*.
depositions taken before, when admissible, 560, *et seq.*
how proved, 630.
information before, 806.

MAHOMETAN,

how to be sworn, 10.

MAKER

of note competent witness against joint maker, 124.
competent for plaintiff in action by indorsee against
maker, 127.

MALICE,

presumption of, 464.

MALICIOUS PROSECUTION,

action for, defendant's evidence before grand jury
admissible evidence, 143.
or his wife's, 171, n. (4.)
plaintiff's character, inadmissible evidence, 489.
variance in matter of description, effect of, 852.
copy of indictment, order necessary to obtain, 802.
copy of information before magistrate, when ordered, 806.

MALICIOUS SHOOTING,

wife competent against husband, on indictment for, 170.
previous shooting admissible evidence on indictment for, 496.

MANOR. And see *Court Rolls, Copyholder*.

custom of, not to be proved from custom in other manors, 483.
unless both formerly held by same lord, 484.
or one anciently parcel of the other, *ib.*
or manors part of a district subject to peculiar tenure,
ib.
or custom laid as custom of the country, 485.
may be proved by reputation, 261.
boundaries of, reputation admissible as to, 250.
maps, 262.

MANOR COURT. See *Court Rolls*.

ancient writings of, evidence as to mode of descent, 261.

MANSLAUGHTER,

prisoner may be convicted of, on indictment for murder, 850.

MAP

of manor or parish, admissible to prove boundaries, when, 262.
annexed to ancient deed, 288.

MARRIAGE. See tit. *Husband and Wife*.

not proveable by husband, in action by wife as *feme sole*, 161.
first, not proveable by husband on indictment for bigamy, *ib*.
not proveable by husband on indictment for conspiracy to
procure it, *ib*.

first, proveable by husband on case of settlement, 163.

forcible, wife competent to prove, 169, n. (3.)

and date of, matter of pedigree, 225.

proof of, when dispensed with by ad-
mission, in action for criminal con-
versation, 377, n. (4.)

in petit treason, *ib*.

bigamy, *ib*.

fact of, how may be proved, 447.

presumption of legitimacy from, 462.

how rebutted, *ib*.

presumption of, from cohabitation or reputation, 463.

sentence of foreign court as to, when conclusive, 535.

when not, 536.

of no effect as to marriage in England of English sub-
jects, *ib*.

sentence of ecclesiastical court as to, when conclusive,

not upon strangers to suit, 544.

unless where proceeding *in rem*, 545.

question of validity examinable by temporal courts, *ib*.

effect of sentence in jactitation suit, 546.

registry of, admissible to prove time of marriage, 595.

effect of as evidence, 596.

how proved, 642.

MASTER,

servant not competent for, in action for negligence, 100.

MASTER OF SHIP. See *Captain*.

MEDICAL WITNESS,

confidential communications made to, not privileged, 176.

statement of symptoms to, when admissible, 203.

opinion of, as to state of health admissible, 899.

as to sanity, how far admissible, *ib*. n.

MEMORANDUM,

to refresh memory of witness, when allowed, 891.

when must be produced, 893.

where writing itself inadmissible, 894.

MEMORANDUM—*continued*.

unstamped receipt, 894.

when allowed though not written by witness, 895.

at what time must have been made, *ib*.

MEMORIAL

inadmissible to prove registered deed, without notice to produce, 445.

of annuity deed, 690.

of assignment of judgment, *ib*.

of deed registered, *ib*.

MESNE PROFITS,

in action for, judgment in ejectment how far conclusive, 512.

MIDWIFE

declarations of, whether admissible in cases of pedigree, 244.

MISDEMEANOR,

depositions before magistrates in cases of, when admissible, 564.

copy of indictment for, matter of right, 803.

expenses of prosecution for, when allowed, 791.

MISTAKE

in indorsement of postea, cannot be proved, to contradict judgment, 506.

in form of action, judgment on account of, not conclusive against plaintiff, 509.

of law, by foreign court, may be shewn, when, 538.

MODUS,

reputation admissible to establish prescription for, 251.

whether in case of farm modus, 253.

declarations of deceased parishioners, admissible as to, 283.

admissions of former occupiers, evidence as to, 414.

not to be proved by custom as to other tenements, 487.

MONUMENTS. See *Inscription*.**MORAVIAN**

affirmation of, has same effect as oath, 13.

MORTGAGOR

admissions, of after conveyance of mortgaged premises, not evidence, 417.

MURDER,

malice presumed from fact of killing, unless contrary appear, 464.

previous threats, &c. admissible evidence of malice, 498.

on charge of, prisoner may be convicted of manslaughter, 850.

when variance as to manner of death, material, *ib*.

what constitutes a principal in, *ib*.

MURDER—*continued*.

- as accessory cannot be convicted as principal, 850.
- of officer in execution of process, when substance of charge proved, 851.
- prisoner may be convicted of, on indictment for petit treason, 849.
- acquittal for, in foreign country, may be pleaded in bar, 536.

NAVY OFFICE,

- book of, evidence of death of sailor, 597.

NEGATIVE,

- of consent, how established, 439.
- of notice of contents of packages, how established, *ib.* 828.
- onus probandi*, when on party relying on, 465, 827. And see tit. *Onus Probandi*.
- where breach of duty alleged, 827.
- where affirmative against presumption of law, 829.
- where fact peculiarly within knowledge of party, *ib.*

NEWSPAPERS,

- proprietorship of, admission by acts, 370, n. (2).

NEXT OF KIN,

- incompetent to prove debt due to intestate, 87, n. (1).

NISI PRIUS RECORD,

- evidence of cause being tried, 618.

NOLLE PROSEQUI,

- to plea of bankruptcy, renders bankrupt competent for co-defendant, in action on joint contract, 54.
- in criminal proceedings, renders defendant competent witness, 69.

NON-ACCESS,

- wife incompetent to prove, 169, and n. (1).
- cannot be proved as matter of pedigree, 226.

NON-ATTENDANCE. See *Attendance*.**NON-CLAIM,**

- presumption of payment, arising from, 479.

NON-JOINDER,

- admission of party jointly liable, evidence in support of plea, 397.
- effect of particulars of demand shewing dealings with party not joined, 880.

NOTICE,

- to quit, service of, may be proved by entry of deceased attorney, 339.
- acquiescence in, when proof of tenancy, 373.

NOTICE—*continued.*

may be proved by secondary evidence, 454.
 of contents of packages, how negatived, 440.
 verbal, to deliver property may be proved, though written
 notice also given, 449.
 of dishonor of bill, may be proved by secondary evidence, 454.
 of proceedings, necessary to validity of foreign judgment, 538.
 attested, must be proved by attesting witness, 649.
 to produce writings, when necessary, 364, 662. And see tit.
Writing.

effect of, 663.

form of, 665.

service of, on whom, *ib.*

how long before trial, *ib.*

time for demanding production under, 668.

when dispensed with,

notice from proceedings, 668.

trover, *ib.*

theft, 669.

reasonable paper, *ib.*

copy considered as original, *ib.*

inscription on banner, *ib.*

resolutions of meeting, 670.

paper containing unlawful oath, *ib.*

possession of instrument fraudulent, 670.

duplicate, *ib.*

counterpart, *ib.*

notice, 671.

attorney's bill, *ib.*

machine copy, *ib.*

ship's articles, *ib.*

deed in court, in possession of opposite
 party, *ib.*

attorney not privileged from proving contents of,
 187.

NUL TIEL RECORD. And see *Judgment.*

on plea of how record proved,

if of same court, 612.

of other superior court, *ib.*

of inferior court, *ib.*

OATH

necessary in all cases before witness can depose, 7.

quære as to the king, 8 n. (2).

U U U 2

OATH—*continued.*

- nature and effect of, 8.
- form of, varied according to religion and witness, 9.
- what religious principle in witness, necessary to render efficacious, 11, 12, and n. (6).
 - how ascertained, 12.
- extra-judicial, abolished, 9, n. (1)
- of secrecy, taken by commissioners' clerk, construction of, 277.
- as to property, before commissioners, not conclusive against deponent, 385.
- required to be entered of record, parol evidence of, inadmissible, 445.
- unlawful, on trial for administering, notice to produce unnecessary, 670.

OBLIGEE,

- release by one, binds co-obligees, 153.

OBLIGOR,

- competent witness against co-obligor, generally, 124.
 - but obligor (principal) incompetent for co-obligor (surety), 86.
- release to one, operates to co-obligors, 153.
- for costs, how rendered competent, 156.

OCCUPATION,

- admission of, by forbearance, 374, n. (1)
- proveable by parol, 443.
 - unless question as to tenancy, *ib.*

OFFICE,

- presumption arising from course of business in, 471.

OFFICER. And see *Bailiff*.

- appointment of, proved by acting, 369, 453, 469.
- admissions of, evidence against sheriff, when, 407.

OFFICIAL ACTS,

- presumption of due execution of, 470.

OFFICIAL COMMUNICATIONS,

- privileged from disclosure, 192.
 - what are not, 194.

OLD WRITINGS,

- what, 651.
- proper custody of, 633.
- how proved, 652.

ONUS PROBANDI,

- on party asserting affirmative, 827.
 - substance and not form of issue looked at, *ib.*
 - negative averment, when, to be proved, *ib.*

ONUS PROBANDI—*continued.*

- barratry, that captain not owner, 827.
- omission of duty, 827.
 - not reading thirty-nine articles, 828.
 - not giving notice, *ib.*
 - under hawkers' and pedlars' act,
 - that party not housekeeper, *ib.*
 - that premises not left in repair, 828.
 - non-consent, 828.
- where affirmative against presumption of law, 829.
- fact peculiarly within knowledge of party, *ib.*
 - time when instrument received, *ib.*
 - qualification to kill game, 830, 465.
 - infancy, *ib.*
- right to practise as apothecary, 465.
- fact admitted on the record, when must be proved, 831.
- effect of, on right to begin and reply. See *Beginning and Reply.*

OPINION

- of counsel, taken by attorney, privileged from disclosure, 185.
- of witness, as to handwriting, how to be acquired, 692.
- of medical man, as to state of health, admissible, 899.
 - how far admissible as to sanity, *ib.*
- of underwriter, as to circumstances tending to increase premium, inadmissible, *ib.*
 - but admissible, as to what the duty of broker in effecting policy, 900.
- of ship-builder, as to seaworthiness, 901.
- of engineer, as to effect of works, *ib.*
- of seal engraver, as to forgery of seal, *ib.*
- of artist, as to genuineness of pictures, *ib.*
- as to genuineness of post mark, *ib.*
- inadmissible, as to legal or moral obligation, 900.

OUTLAWRY,

- judgment of, when incapacitates witness, 18.
- reversal of, restores competency, 21.

OVERT ACT

- of treason
- not laid in indictment, when inadmissible, 491.
 - when admissible, 493.
- time of, variance in proof immaterial, 862.
- confession of, must be made to two witnesses, 435.
 - unless in case of actual attempt on king's life, 436.

OVERT ACT—*continued.*

or when adduced in confirmation of other evidence,
436.

OWNER

of rateable property, incompetent witness to disprove liability
to charge, 94.

of ship, incompetent in action on policy to prove sea-worthiness, 100.

register, when evidence for and against, 597.

of stolen goods, entitled to restitution, competent witness for
prosecution, 129.

part owner, released, competent for defendant, 154.

admissions of, evidence in action by captain for freight, 394.

beneficial conveyance of legal estate to, when presumed, 475.

OWNERSHIP. And see *Reputed Ownership.*

admissions of, in attorney's undertaking to appear, conclusive,
when, 389.

by forbearance, 374.

by not contradicting statement of claim, *ib.*

presumption of, from possession, 472.

how rebutted, *ib.*

of roads, rivers, fences, &c. *ib.*

evidence of, inadmissible from acts of ownership on other portions
of land, 487.

unless in proof of general right through whole extent
of inclosures, 485.

PAPAL BULL. See *Bull.*

PAPERS

of conspirators, when admissible against co-conspirator, 210.

ancient, proper custody of, 635.

PARDON,

when restores competency of witness, 22.

how proved, *ib.*

conditional, renders witness competent, when, 22.

under sign manual, effect of, 22.

accomplice entitled to, as of right in what cases, 27.

entitled to, in equity, when, 27.

statutory title to, not ground of incompetency as witness, 131.

PARI JURE,

declarations by persons in *pari jure* admissible in matters of
pedigree and general interest, when, 283.

PARISH

boundary of, may be proved by reputation, 251.

PARISH—*continued.*

- perambulations of, 259.
- maps of, 262.
- custom of, when presumed, 470.
 - not to be proved by custom of other parishes, 487.
- judgment against, when evidence for another parish, 520.
- how affected by judgment of quarter sessions on appeal against removal, 529.
 - where order quashed, 529.
 - where order confirmed, 531.
- name by repute of, when sufficient, 862.
- register See tit. *Register*.
- inhabitant of. See tit. *Inhabitant*.
- book. See tit. *Book*.

PARLIAMENT

- debates in, privileged from disclosure, 194.
- judgment in, how proved, 618.
- journals of. See *Journals*.
- acts of. See *Act of Parliament*.

PARLIAMENTARY SURVEY,

- admissibility of, 586.

PAROL EVIDENCE

- when admissible to explain written instrument,
 - where latent ambiguity,
 - description applicable to several objects, 712.
 - estates of same name, *ib.*
 - devisees of same name, *ib.* 741.
 - description part true, part false, 713.
 - of estate, 713.
 - of fund, *ib.*
 - description entirely false, 715.
 - intention to give different description cannot be shewn, 717.
 - no person answering description, 718.
 - no estate answering description, 719.
 - where after rejection of erroneous part, no sufficient indication of intention remains, 729.
 - word without meaning, 730.
- words construed according to situation of party, 731.
 - situation with respect to property, 732, 734.

PAROL EVIDENCE—*continued.*

- situation with respect to objects of bequest, 733, 740, 744.
 - technical terms, 738, 743.
 - mercantile terms, 739, 743.
- subject matter nearest to description to be adopted, 743.
- description may be in one or several terms, 744.
- usage admissible in construction of ancient instruments, 745.
 - or old act of parliament, *ib.* n (4.)
 - private deed, 747.
- parol inadmissible where ambiguity patent, 749.
- uncertainty in devise, 749.
- blank in will, 750.
- reference to other expressions of intention, *ib.*
 - must refer to written instrument, *ib.*
 - or to facts, 751. n (3.)
- instrument referred to must be capable of identification, 75.
- where reference applies to several instruments, evidence admissible to shew which is meant, 752. and n (2.)
- when admissible to vary or discharge written instrument,
 - general rule against admission of parol, applies to cases not within Stat. Frauds, 753.
- deeds, *ib.*
 - time of holding in lease, parol inadmissible as to, 754.
 - except where a lease by parol, *ib.* n (3.)
- terms on which policy subscribed, 755.
- terms of charter party, *ib.*
- contract as to seamen's wages, 756.
- contract for sale of goods, *ib.*
- bill or note, agreement as to, *ib.*
- when admissible to annul instrument as void, 757.
 - for want of consideration,
 - deed, *ib.* n (3.) And see *Estoppel.*
 - agreement, *ib.*
 - bill or note, *ib.* n (2.)
 - for illegality,
 - deed, 758.
 - contract of sale, *ib.* n (1.)

PAROL EVIDENCE—*continued.*

for illegality,

bill or note, *ib.* n (1.) *ad fin.*

annuity deed, 760.

for fraud,

will, 758.

deed, different consideration
759, and n (1.) And see *Es-*
*toppel.*party charged with fraud, not
allowed to prove different
consideration, 763.

admissible to vary written instrument, when,

bond, different condition cannot be
shown, 761.deed, different use, *ib.*different consideration consistent with
deed, 762.no consideration expressed 762. and
n *

delivery at different time, 763.

admissible to shew custom, regulating subject
of contract, when,

custom of country as to tenancy, 764.

usage of merchants,

insurance, meaning of warranty, 767.

contract for seamen's wages, 678.

usage must not be inconsistent with
contract, 769.not admissible where contract manifestly com-
plete, 770.

additional rent, 771.

indemnification against taxes, *ib.*

verbal declaration by auctioneer, 772.

admissible when contract manifestly incom-
plete, 773.parts of contract in different letters, *ib.*admissible to shew subsequent alteration of
contract, when,contract under seal not altered by parol,
774.contract not under seal, altered by parol,
*ib.*where no breach, *ib.* n (2.)and alteration not inconsistent, *ib.*

PAROL EVIDENCE—*continued.*

- contract under Stat. of Frauds, not altered by parol, 775.
- admissible to shew discharge of contract, when,
 - contracts under seal not discharged by parol, 776.
 - contracts not under seal, discharged by parol, *ib.*
 - whether contracts under Stat. Frauds, *ib.*
- admissible to shew grounds of judgment of quarter sessions on removal, 530.

PARSON,

- entry by deceased parson as to ecclesiastical dues, admissible for successor, 322.
- but must admit payment, 323.
- acting as, evidence of incumbency, 370.
- admission of lessee of tithes, evidence against, 413.
- admission of, evidence against successor, 414.

PARTIAL LOSS,

- under policy, proof of, admissible under allegation of total loss, 847.

PARTICULARS OF DEMAND AND SET-OFF,

- binding on party giving them, 876.
- not admitted, by plea in excuse, or in confession and avoidance, *ib.*
- nor by payment of money into court, *ib.*
- evidence inconsistent with, inadmissible, *ib.*
- not invalidated by clerical error, 877.
- nor by error in date, 878.
- nor by wrong description, *ib.*
- unless opposite party misled, *ib.*
- delivery of, how enforced against plaintiff, *ib.*
- against defendant, *ib.*
- with dates, what insufficient, 879.
- proof of delivery, when necessary, *ib.*
- need not refer to demand under special counts, *ib.*
- plaintiff not confined to, where case altered by defendant's proof, *ib.*
- items of, when not separable, 880.
- credits allowed in, effect of, as admissions, *ib.*
- whether plea of payment necessary as to, 881.

PARTNER

- incompetent, for defendant, in action against co-partner, to prove or disprove partnership, 85.

PARTNER—continued.

- but competent for plaintiff, 124.
- rendered competent for partner, by mutual releases, 154.
- ostensible, when estopped from disputing partnership, 381.
- admissions by, when party to suit, evidence against co-partners, 399.
- when not party, how far evidence, 400.

PART OWNER,

- admissions of, not evidence against others, 400.

PARTNERSHIP

- admissions of partners as to, 399.

PARTY

- to suit, incompetent generally as witness, 46.
- grounds of incompetency, 47.
- incompetency distinguishable from privilege not to be examined, 47 n (1).
- to civil suit incompetent
 - if interested in the event of the cause, 47.
 - corporators, 48.
 - or in the costs, 48.
 - trustee, 48.
 - prochein ami*, 48.
 - guardian, 48.
 - governor of the poor, 48.
 - parochial trustee suing by treasurer, 49, and n (2).
- competent if free from interest
 - corporator, 49.
 - non-rated inhabitant, 50.
- incompetent at commencement of suit, rendered competent by subsequent proceedings, when. See tit. *Defendant*.
- to criminal proceedings. See tit. *Prosecutor and Defendant*.
- in equity suit, competent on issue directed, when, 142.
- privilege of, not to be examined, 156, and seq. See tit. *Plaintiff and Defendant*.
- nominal, admissions of, binding, 393.
- real, bound by judgment, 515.
 - party justified under, *ib*.
 - lessor of the plaintiff, 516.
- inspection of documents by, 820.

PATENT OF INVENTION,

- purchaser of license under, competent witness for original patentee, 121.

PAUPER,

settlement of, how far determined by judgment of Quarter Sessions discharging order of removal, 529.
confirming, 531.

PAYEE,

competency of, 41.

PAYMENT

of fine, defendant rendered competent witness by, 69.
proved by entry of deceased scrivener, 337.
clerk, 338.
proved by parol, though receipt taken, 449.
plea of, whether necessary as to credits in plaintiff's particulars, 881.

PAYMENT INTO COURT,

how far admission of particulars of demand, 876.

PEDIGREE

as to admissibility of hearsay in cases of. See tit. *Hearsay*.
chart of, admissible, when, 232.
when author must be shewn, 244.
when made with a view to claim, inadmissible, 280.

PENALTIES,

acquittal in action for, admissible in civil suit, 523.
conviction for in Exchequer, not conclusive on strangers, 552.

PERAMBULATION,

declarations as to, admissible in questions of public boundaries, 259.

PERJURY,

conviction of, incapacitates witness, 17.
competency, how restored, 22.
in indictment for, prosecutor competent witness, 64.
when not, *ib. n.* (5.)
under stat. 5 Eliz. c. 9, though entitled to part of penalty, 68.
party separately indicted for same perjury, competent for defendant, 115.
party to civil action on same point, competent for prosecution, 116.
dying declarations inadmissible as to, 295.

PETITIONING CREDITOR,

estopped from disputing bankruptcy, 380.
admissions of evidence against assignees, when, 397.
when not, 396.

PETIT TREASON,

on indictment for, prisoner may be convicted of murder, 849.

PEW,

faculty for, when presumed, 474.

vestry book evidence as to, 600.

PHYSICIAN,

qualification of, when admitted, 372.

confidential communications to, not privileged,

proof of being, production of diploma not sufficient, 607.

PLACE

of birth not proveable as matter of pedigree, 226.

mentioned in record, of personal action, not conclusive, 507.

variance in proof, when material, 862.

when not, 863.

amendment as to at nisi prius, when

allowed, 871, 872.

PLAINTIFF

in equity suit, competent witness on issue directed, when, 142.

privilege not to be examined, 156.

when may be waived, 158.

PLEADING,

judgment arising from bad pleading, not conclusive against party, 509.

PLEA IN EQUITY

does not amount to admission of truth of fact charged in bill, 557.

POISONING

wife competent against husband, on indictment for, 170, n. (3.)

POLICY OF INSURANCE. See tit. *Captain, Underwriter, Consolidation Rule.*

party beneficially interested in, incompetent as witness for assured, 83.

though claim released, *ib.*

adjustment on, not conclusive against underwriter, 389.

party beneficially interested in, admissions of, evidence against nominal party, 394.

cannot be proved by entries in books of insurance company, 444.

possession of ship, *prima facie* evidence of ownership, 472.

in action on, sentence of court of admiralty, how far conclusive, 533.

parol inadmissible as to terms on which subscribed, 755.

parol admissible to explain usage of merchants, 767.

usage must not be inconsistent with express words of policy, 769.

inspection of papers in action on, when ordered, 822.

POLICY OF INSURANCE—*continued.*

total loss on, allegation of, supported by proof of partial loss,
847.

POLL-BOOK,

for what purposes admissible, 598.
how proved, 639.

POPE,

license of, admissible, 594.
bull of, admissible, *ib.*
taxation of, admissible, 586.

POSSESSION

ancient, proved by old documents, when, 286.
within what limitations, 289.
of document by client, attorney not privileged from proving,
187.
of stolen property, presumption arising from, 466.
presumption of ownership from, 472.
how rebutted, 472.
of beneficial owner, conveyance presumed from legal owner,
when, 475.
livery of seisin, when presumed from, 478.
of bill of exchange by acceptor, presumption of payment
arising from, 479.
of property, presumption of reputed ownership, when, 479.
of writings by party on whom notice to produce served, how
proved, 664.
by privies, *ib.*
by independent party, 664.

POST,

putting letter in, presumption as to receipt of, 471.
post mark, evidence of letter being put in the post, 604.
how proved, 648, 901.

POSTEA,

mistake in indorsement of, inadmissible to contradict judgment, 506.
insufficient to prove judgment, 618.
but evidence, of fact of trial, *ib.*

And see Nisi Prius Record.

POST MORTEM INQUISITIONS,

effect of as evidence, 580.

POSTPONEMENT OF TRIAL,

on account of absence of witness, 800.

POWER,

indefinite term in, when may be explained by parol, 735.

POWER OF ATTORNEY. See tit. *Attorney.*

PRÆMUNIRE,

conviction of, incapacitates as witness, 17.

PRESCRIPTION,

public, reputation admissible as to, 251.

private, whether reputation admissible, 253.

presumption of, from modern user, when conclusive, 461.

under 2 & 3 W. 4, c. 71, 473.

statement of, effect of variance in proof, 852.

what sufficient, 857.

in action for disturbance, 858.

in plea in bar, *ib.*

PRESENTATION,

reputation inadmissible as evidence of, 257.

PRESENTMENT,

of homage, on same question, inadmissible as to manorial rights, 275.

PRESUMPTION AND PRESUMPTIVE EVIDENCE,

definition of, 457.

principles on which founded, *ib.*

distinction between conclusive and authorized presumptions, 459.

of prescription, from modern user, 461.

of unseaworthiness, from distress without cause, *ib.*

particular presumptions,

of incompetency to crime, from age, 461.

of legitimacy, from marriage of mother, 462.

presumption when destroyed, 462.

of marriage, from cohabitation, 463.

of intention to defraud, *ib.*

of malice, in libel, 464.

of murder, from homicide, *ib.*

of innocence, *ib.*

onus probandi, when on negative, 465.

when on affirmative, *ib.*

of publication of libel, 466.

of theft, from possession, *ib.*

of adverse nature of evidence, from suppression, *ib.*

of defect of title, from fabrication of evidence, 467.

of fear, in cases of robbery, *ib.*

of continuance, 468.

of death, from absence for seven years, *ib.*

of survivorship, 469.

of loss of ship, *ib.*

of appointment, to office, from acting, *ib.*

PRESUMPTION AND PRESUMPTIVE EVIDENCE—

continued.

- of due execution of official duty or business, 469.
 - parish certificate, 470.
 - execution of deed, *ib.*
 - inrolment of annuity, *ib.*
 - not applicable in questions of jurisdiction of inferior courts, 471.
- of course of public office, 471.
 - custom-house entry, *ib.*
 - letter sent by post, *ib.*
- of property, from possession, 472.
- of ownership of roads and boundaries, from contiguity, 472.
- of incorporeal rights, from user by 2 & 3 W. 4, c. 71, 473.
- of dedication of public ways, *ib.*
- of faculties, 474.
- of copyhold customs, *ib.*
- of liability to repair fences, *ib.*
- of act of parliament, *ib.*
- of grant from the crown, 475.
- of conveyance of legal estate to beneficial owner, *ib.*
 - where possession not to be otherwise accounted for, *ib.*
- of surrender of outstanding terms, 476.
 - where acts of owner inconsistent with existence of term, 477.
 - effect of, marriage settlements not noticing term, *ib.*
- of livery of seisin, from twenty years' possession, 478.
- of licence, from acquiescence, *ib.*
- of bye-law, from usage, *ib.*
- of compassing the king's death, *ib.*
- of payment, from non-claim, 479.
 - receipt for last rent, *ib.*
 - bill of exchange in possession of acceptor, *ib.*
- of reputed ownership, from possession, *ib.*
- of acceptance of benefit, 480.
 - surrender without notice, *ib.*
- when disallowed as irrelevant,
 - of contract, from other contracts generally, 482.
 - between landlord and other tenants, *ib.*
 - quality of goods supplied to other persons, *ib.*

PRESUMPTION AND PRESUMPTIVE EVIDENCE—

continued.

irrelevant presumptions,

but other transactions adducible, to shew knowledge or intention, 482.

general authority to draw bills, *ib.*

of manorial custom, from custom in other manors, 483.

unless both manors formerly held under same lord, 484.

or one anciently parcel of the other, *ib.*or manors within district subject to peculiar tenure, *ib.*

or custom laid as custom of the country, 485.

of ownership, from acts of ownership on other portions of land, 487.

unless in proof of general right through whole extent of inclosures, 485.

of custom as to tithing, by custom in other parishes, 487.

unless on cross-examination, *ib.*

arising from evidence of character, 488.

in civil suits, not allowed, *ib.*unless character the point in issue, *ib.*adultery, *ib.*defamation, *ib.*

seduction, 489.

malicious prosecution, *ib.*

in criminal cases.

of prosecutrix in rape, 490.

of prisoner, *ib.*

must not be of particular acts, 491.

effect of, *ib.*

witnesses as to, not cross-examined, 492.

answered by proof of previous conviction, *ib.*

of guilt in criminal cases from commission of other offences, 492.

treason, overt acts not laid in indictment, *ib.*

burglary, previous larceny by prisoner on same premises, 493.

unless several acts, constituting one offence, *ib.*

or where offence consists of guilty knowledge or intention, 494.

uttering forged notes, or counterfeit money—previous uttering, *ib.*

subsequent uttering, when admissible, 496.

malicious shooting, *ib.*

threatening letter, 497.

PRESUMPTION AND PRESUMPTIVE EVIDENCE—

continued.

libel, 497.

receiving stolen goods, *ib.*conspiracy to cheat, *ib.*barratry, *ib.*

murder, 498.

conspiracy to riot, *ib.*acts and declarations of prisoner when
evidence for him, 499.in favour of defendant, throws proof of negative on plaintiff,
829.

PRINCIPAL DEBTOR,

defendant in joint action against himself and his surety,
competent witness for plaintiff, when, 52.

incompetent, in action against surety, to prove payment, 86.

admission of, not evidence against surety, 411.

PRINCIPAL FELON,

competent as witness against accessary, 29.

judgment against, when admissible against accessary, 520.

what sufficient proof of being, in murder, 850.

cannot be convicted as accessary, 851.

PRISON BOOK. See *Commitment.*

PRISONER,

inquiry as to character of, 490.

must not be of particular acts, 491.

effect of, *ib.*

witnesses not cross-examined, 492.

answered by proof of previous conviction, *ib.*

deposition taken in absence of, inadmissible, 569, 570.

how attendance of, as witness, obtained, 783.

PRISONER OF WAR,

attendance of, as witness, how obtained, 784.

PRIVILEGE OF WITNESS,

from arrest,

service of subpoena not necessary to confer, 782.

for what time, *ib.*

on arbitration, 783.

on execution of writ of inquiry, *ib.*before commissioners of bankrupt, *ib.*before court martial, *ib.*does not extend to arrest by bail, *ib.*

from answering,

where answer might subject to penalties, 913.

prosecutrix in rape as to crim. con., 914.

PRIVILEGE OF WITNESS—continued.

- alleged putative father of bastard, as to that fact, 914.
- copier of libel, *ib.*
- accomplice, as to other offences, *ib.*
- where answer might subject to civil suit.
- witness compellable to answer, 914.
- but not party, 915.
- rated inhabitant, *ib.*
- where answer might subject to forfeiture, 916.
- where answer might degrade witness's character, 916.
- witness not compellable to answer, *ib.*
- but question admissible, 920.
- and if answered, answer conclusive, 923.

PRIVILEGED COMMUNICATION,

- between attorney, &c., and client,
- principle of exclusion as evidence, 174.
- privilege, that of client, *ib.*
- waiver of it,
 - when not waived, *ib.*
- to what persons privilege extends,
 - interpreter, 175.
 - attorney's clerk, *ib.*
 - barrister's clerk, *ib.*
 - arbitrator, *ib.* n. (1).
 - attorney not employed, *ib.*
 - confidential adviser (not attorney) *ib.*
 - conveyancer, *ib.* n. (7).
 - scrivener, *ib.*
 - medical man, 176.
 - friend, *ib.*
 - banker, *ib.*
 - steward, 176, 177, n. (1).
 - clergyman, 177, and n. (2).
 - clerk to commissioners,
 - oath of secrecy, how construed, 177.
- what are privileged communications,
 - where suit pending or expected, 178.
 - collateral communications, *ib.*
 - made after suit, 178.
 - made after change of attorney, *ib.*
 - where no suit expected, 180.
 - respecting sale and purchase of estates, *ib.*
 - instructions for deed not drawn thereunder, *ib.*
 - advice asked for unlawful purpose, 181.
 - knowledge of client's title, *ib.*

PRIVILEGED COMMUNICATION—*continued.*

- date of deposit or possession of deeds, 181.
- act of client seen by attorney, *ib.*
- deeds deposited with attorney, 182.
- on prosecutions,
 - note deposited with attorney, on which forgery by client afterwards charged, 182.
- where attorney employed by both parties, 184.
 - vendor and purchaser, *ib.*
 - borrower and lender, *ib.*
- affecting strangers to suit
 - case and opinion as to title, 185.
 - title deeds, *ib.*
 - composition deed, *ib.*
 - lease, *ib.*
- admissibility of document, question for judge, 186.
- where communication not made in character of attorney and client, 186, 187.
 - execution of deed, *ib.*
 - erasure in deed or will, 187.
 - oath on indictment for perjury, *ib.*
 - notice to produce, *ib.*
 - usurious consideration, *ib.*
 - real party in cause, *ib.*
 - identity of client, *ib.*
 - possession of document by client, *ib.*
 - client's hand-writing, *ib.*
- other privileged communications,
 - communications to government for detecting crimes, 189.
 - by spies, *ib.*
 - by agents of police,
 - how far privileged, *ib.*
 - official communications,
 - by officer of government, 192.
 - by governor of colony, 193.
 - report of military court of inquiry, *ib.*
 - correspondence of revenue commissioners and officer,
 - letter of secretary of state, *ib.*
 - what not considered official communication, 194.
 - debates in parliament, *ib.*
 - evidence before grand jury,
 - grand juror, 193.
 - witness, 194.
 - evidence of indecent nature, when rejected, 195, n. (1.)

PRIVY,

- admissions of, how far evidence, 412.
- judgments admissible for or against, 517.

PRIZE,

- judgments of, in foreign courts as to, conclusive, when, 532.
- when not, 534.

PROBATE,

- the proper evidence of appointment of executor, 543, 645.
- but forgery may be proved, 544.
- or want of jurisdiction, *ib.*
- conclusive of what, 549.
- how proved when lost, 645.
- revocation of, how proved, 647.
- not admissible, on charge of forgery, 549.

PROCHIEN AMY,

- incompetent as witness, 48.
- admissions of, before suit, not evidence, 498.

PROCLAMATION,

- royal,
- statement in, admissible in evidence, 591.
- judicial notice not taken of, 639.
- how proved, 591.
- of fine, how proved, 615.

PRODUCTION OF WRITINGS. See *tit. Inspection and Notice.*

- for the purpose of stamping, when compelled, 821.
- how order enforced, 825.
- on trial, does not subject party producing to cross-examination, unless actually sworn, 908.

PROMISSORY NOTE. And see *Bill of Exchange.*

- competency and incompetency of parties to, as witnesses, 124, *et seq.*
- admission of former holder, when evidence, 415.
- parol evidence as to,
 - inadmissible, to shew contemporary agreement, varying terms of, 756.
 - admissible to prove want of consideration, 757.
 - or fraud, 758.
- to husband and wife, what sufficient proof of averment of, 859.
- making of, variance in proof as to day immaterial, 862.

PROPERTY,

- presumption as to, from possession. See *tit. Possession.*
- judgment as to, by Court of Admiralty, conclusive, 533.

PROPERTY—*continued*.

avertment of, in indictment for burglary, what considered variance, 855.

PROSECUTOR,

generally competent as witness, 61.

why, 62.

unless directly interested in conviction, 64.

what constitutes direct interest, *ib*.

quære, as to expectation of defendant's being witness against prosecutor, 64, n. (5).

incompetent where entitled to immediate benefit from conviction, 66.

on summary convictions, when entitled to part of penalty, *ib*.

indictment for forcible entry, when entitled to restitution, *ib*.

but competent though immediately benefited by conviction, when, 66.

on indictment for theft or robbery, though entitled to restitution, 67.

where separate action necessary for recovery of penalty, *ib*.
fraudulent gaming, *ib*.

seducing artificers,

perjury under 5 Eliz. c. 9, 68.

when court has discretion to imprison in lieu of penalty, *ib*.

evidence of, before grand jury, admissible in action for malicious prosecution, 143.

competent witness on indictment removed by certiorari, 143.

inducements by, invalidate confession, when, 430.

expences of, when allowed, 788.

PROTEST

of notary, not evidence of presentment of bill, 607.

ship protest, how far admissible, 607.

PUBLIC BOOKS. See tit. *Book, Entry, &c*.

inspection of, 806,

PUBLIC RIGHTS,

definition of, 251.

reputation admissible as to, when, 251.

party disputing, competent witness against, 139.

PUBLICATION

of libel, when presumed, 466.

sufficient to convict on indictment for composing, &c., 849.

PUNISHMENT,

endurance of, for felony, restores competency of witness, when, 23.

for misdemeanors, when, 24.

what amounts to, *ib.*

PURCHASE,

confidential communications respecting, by client to attorney privileged, 180.

QUAKERS,

affirmation, &c. of, same effect as oath, 13.

QUALIFICATION,

by degree, proof of, when dispensed with by admission, 371.

to kill game, must be proved by party claiming, 830.

QUARTER SESSIONS. And see tit. *Judgment.*

judgments of, on appeals against orders of removal, how far conclusive, 529.

record of, how proved, 622.

bill of exceptions not allowable at, 948.

QUESTION, LEADING. See *Leading Question.***QUO WARRANTO,**

judgment of ouster, of party claimed under, admissible in, 518.

inspection of documents allowed in, 813.

RAPE,

wife competent against husband to prove, 170.

complaint of prosecutrix, particulars of, inadmissible, 204.

not considered part of the *res gestæ*,
ib.

presumption of incompetency to commit, 461.

character of prosecutrix, relevant inquiry on charges of, 490.

but must not relate to particular acts, *ib.* 914.

except as to previous connexion with the prisoner, *ib.*

RATED INHABITANTS. See *Inhabitants.***REALTY,**

judgment of foreign court as to, conclusive, 532.

RECEIPT,

not conclusive evidence, against party giving it, 388.

indorsed on deed, does not operate as estoppel, *ib.*

for subsequent rent, presumption of payment of former rent, 479.

ancient, not admissible unless produced from proper custody, 635.

RECEIPT—*continued.*

- how proved, 652.
- of premium under policy, conclusive between what parties, 388 n. (2.)
- in deed, when not conclusive, *ib.*
- received full of all demands, when conclusive, *ib.*
- on bill or note, parol evidence admissible, to shew between what parties, 389, n. (2.)
- by illiterate person, not conclusive, *ib.*
- indorsed on bond, effect of, 347.
 - on bill or note, *ib.*
- given by deceased person, evidence, though in no privity with party paying, 313.
- of taxgatherer evidence as to occupancy, 314, n. (1.)
- of former incumbent, 314.
- unstamped, allowable to refresh memory of witness, 894.

RECEIVER OF STOLEN GOODS,

- thief (if not convicted) competent witness against, 29.
- not convicted on evidence of accomplice, unless confirmed as to identity both of principal felon and receiver, 36, and n. (3).
- proof of receiving other goods, admissible as to animus, 497.

RECITAL

- in deed, admissible as evidence, in cases of pedigree, 229.
 - not against strangers to the deed, 230.
- conclusive, between parties, 386.
- prima facie* evidence, between party and stranger, 387.
- how far admissible for stranger against party, 388.
- of deed, when admissible in proof of deed, 683.

RECOGNIZANCE

- of witness to appear on trial, 786.

RECORD. And see *Judgment.*

- admission of, does not dispense with production, 365.
- matter of, parol evidence inadmissible as to, 445.
- examined copy of, admissible, 452.
- correspondence of, with others, proveable by parol, 454.
- how proved,
 - public act, 610.
 - private act, 611.
 - judicial record,
 - by copy under seal of court, 612.
 - by office copy, 613.
 - by copy of authorized officer, 614.
 - by examined copy, 615.
 - by presumption when record lost, 617.

RECORD—*continued.*

- judgment of house of lords, 618.
- verdict, *ib.*
- postea, 168.
- decree in chancery, 619.
- answer in chancery, 620.
- criminal proceedings, 622.
- ecclesiastical sentences, *ib.*
- proceedings of inferior courts, *ib.*
- of insolvent court, 623.
- of foreign court, 623.
- of award, 627.
- of inquisition, *ib.*
- of deposition in Chancery, 628.
- of affidavits, 629.
- of depositions before magistrates, 630.
- of depositions at judge's chambers, 631.
- of writs, *ib.*
- variance in proof of, when fatal,
 - when tenor set out, 859.
 - where substance stated, *ib.*
- non-judicial, effect of in evidence, 589.
- proper custody of, 632.
- inspection of, when matter of right, 802.
 - when order of court necessary, *ib.*

RECTOR. See *Parson.*

RE-EXAMINATION,

- of witness, as to parts of previous contrary statement, not given in cross-examination, admissible when confined to motives and meaning, 940.
- inadmissible as to previous statement, agreeing with examination in chief, 944.

REFEREE

- declaration of, receivable as admission, 405.

REGISTER

- parochial, admissible as evidence, in matters of pedigree, 257.
 - not to prove date or place of birth, 246, 595.
 - unless shewn to be entered by request of relatives, *ib.* n. (1)
- admissible to prove time of marriage, 595.
- not admissible as to time of birth, on plea of infancy, 595.
- nor as to place of birth, *ib.*
- of marriage, effect of, as evidence, 596.

REGISTER—*continued*.

subscribing witnesses need not be called,
596, 642.

how proved, 642.

when transcript admissible, *ib*.

of Fleet marriages, inadmissible, 595.

of foreign chapel, inadmissible, 596.

of dissenting chapel inadmissible, *ib*.

of ship, not evidence for owner, 597.

when evidence against him, *ib*.

conclusive against strangers, *ib*.

how proved, 643.

of navy office, evidence of death of seamen, 597.

inspection of, when allowed, 806, 808, 809.

REGISTRY

of bishop or archdeacon, proper custody of terrier, 644.

RELEASE,

necessity of, to remove incompetency of witness. See *Witness*.

RENT,

payment of, when presumed, 479.

reservation of, not to be presumed from contract with other
tenants, 482.

RELATIONSHIP,

matter of pedigree, 225.

of declarant, necessary to admissibility of hearsay in pedigree,
242.

to be proved dehors the declaration, 247.

RELEVANCY,

of proof. See *Substance, Variance*.

of presumption. See *Presumption*.

RELIGIOUS PRINCIPLE,

defect of, when a ground of incompetency, 11.

examination of witness as to, 12.

REMAINDER MAN

incompetent as witness in ejectment, for tenant in tail, 91.

judgment against, binding on one next in remainder, 519.

REMOVAL,

order of, effect of judgment of quarter sessions discharging,
529.

confirming, 531.

RENT-ROLL

admissible, as evidence of ownership, when, 286.

REPLEVIN,

surety in bond, incompetent as witness, 81.

REPLEVIN—*continued*.

- competency how restored, 81.
- party under whom defendant makes cognizance, incompetent as witness, 95.
- except, where, *ib*.
- statement of lease in, when sufficient, 848.

REPLY,

- evidence in, when admissible,
 - election of plaintiff to answer defendant's case by anticipation, 843.
 - effect of election, *ib*.
 - where defendant proves specific fact, *ib*.
- general, right to,
 - where evidence on both sides, 843.
 - where no evidence in answer, 844.
 - where new fact stated, but not proved, *ib*.
 - in criminal cases, *ib*.

REPUTATION. And see *Hearsay*.

- family, admissible in matters of pedigree, 243.
- public, admissible in matters of general interest, 251, *et seq*.

REPUTED OWNERSHIP,

- hearsay admissible as to, 199.
- presumed from possession, when, 479.

RES GESTÆ. See tit. *Hearsay*.

RES INTER ALIOS ACTA, 264.

RESIDUARY LEGATEE. See tit. *Legatee*.

RESIGNATION

- of corporator, restores his competency, 155.

RESOLUTION

- at meeting, how proved, in cases of conspiracy, 450.
- notice to produce unnecessary, 670.
- of parliament, not admissible in evidence, 590.

RETAINER,

- date of, barrister's clerk privileged from proving, 175.

REVERSAL

- of judgment. See tit. *Judgment*.

REVERSIONER,

- judgment for or against lessee, evidence as to, 519.
- judgment against tenant for life, not binding on, *ib*.

REVOCATION

- of probate how proved, 647.

REWARD,

- title to, on conviction, does not incapacitate witness, 131.

RIOT,

- declarations of mob, when admissible on prosecution for, 215.

RIVER,

presumption as to ownership of, from contiguity of land, 472.

ROAD. See *Highway*.**ROBBERY,**

on indictment for, owner of stolen goods competent witness
for prosecution, 67, 129.

dying declarations, inadmissible as to, 295.

presumption of fear, 467.

indictment for, prisoner may be convicted of larceny, 849.

what unnecessary averment in, 854.

ROLLS. See *Court Rolls*.**RULE OF COURT,**

how proved, 632.

RUMOUR,

hearsay admissible to prove, 199.

SALE,

confidential communications respecting, by client to attorney,
&c. privileged, 180.

contract in writing for, cannot be varied by parol, 756.

SANITY,

letters admissible, shewing writers opinion as to, 198.

opinion of medical man as to, admissible, 899.

not as to sanity of act in question, *ib.* n.

SCOTCH COVENANTER,

how sworn, 10.

SCRIVENER,

whether confidential communications to, privileged, 175, n. (7.)

SEAL

of foreign court, must be authenticated, 623.

of ecclesiastical court, need not be proved, 646.

of London, need not be proved, 647.

of other corporations, must be proved genuine, *ib.*

of court or corporation, whether to be authenticated where
deed thirty years' old, 652.

forgery of, opinion of seal engraver admissible as to, 901.

SEAMEN,

contract by, for wages must be in writing, 756.

cannot be varied by parol, *ib.*

usage of merchants as to, may be proved, 768.

SEARCH

for writings, what sufficient, to admit secondary evidence, 674.

SECONDARY EVIDENCE,

doctrine as to, how far applicable to admissions, 364.

rule as to exclusion of, 437.

SECONDARY EVIDENCE—*continued.*

rule excluding,

not applicable to selection of proofs, 438.

execution of deed, proved by one of several
attesting witnesses, *ib.*

handwriting, by other person than writer, *ib.*

contents of letter, *ib.*

absence of consent, by other evidence than owner,
&c., 439.

of notice of contents of packages, 440.

nor where distinct sources of information, *ib.*

declarations of deceased persons, of fact proveable
by living witness, *ib.*

entry of deceased collector, 441.

with respect to substitution of oral for written evidence, *ib.*

where writing subject of dispute, *ib.*

letters to discredit witness, 442.

allotments by inclosure commissioners, *ib.*

contracts as to tenancy, *ib.*

contracts as to work and labour, 443.

not applicable to collateral writing, 444.

with respect to substitution of inferior written evidence, *ib.*

entry in books, of effect of deed, *ib.*

memorial of registered deed, 445.

copy of copy, *ib.* n. (2.)

with respect to extrinsic evidence of judicial proceedings,
445.

parol evidence of oath recorded, *ib.*

of day cause tried, *ib.*

historical evidence as to matter of record, *ib.*

parol evidence of written examination of prisoner,
446.

how far additional statement of prisoner ad-
missible, *ib.*

or parol evidence of informal written exami-
nation, *ib.*

not applicable to oral proof of marriage, 447.

not applicable to admissions, 448. And see *Admission.*

applicable to writing used to refresh memory of witness,
449.

as to duplicate original, *ib.*

not applicable where writing collateral,

parol evidence of payment of money, *ib.*

parol notice to deliver property, *ib.*

or where writing not admissible in evidence,
unstamped receipt, 450.

SECONDARY EVIDENCE—*continued.*

- verbal promise accompanying written, 450.
- not applicable in cases of conspiracy, to paper containing
 - resolutions delivered by prisoner, *ib.*
 - or to inscriptions on flags, &c., *ib.*
 - or to resolutions read at meeting, 451.
- exceptions to the rule,
 - examined copies of records, 452.
 - court rolls, *ib.*
 - public books, *ib.*
 - appointment of public officer, *ib.*
 - of surrogate, 453.
 - of commissioner to take affidavits, *ib.*
 - of under-sheriff, *ib.*
 - of vestry clerk, *ib.*
 - voluminous facts, 454.
 - inspection of many books, *ib.*
 - mode of dealing as to bills, *ib.*
 - general balance, *ib.*
 - correspondence of records, *ib.*
 - result of investigation of accounts, *ib.*
 - examination on *voir dire*, *ib.*
 - notice of dishonor, *ib.*
 - to quit, *ib.*
 - attorney's bill of costs, *ib.*
 - missing document, 455.
 - absent witness, *ib.*
- depositions, when received as, 576.
- of written instrument, what sufficient,
 - letters, parol evidence, 681.
 - copy by deceased clerk, 682, 684.
 - deed, &c., attesting witness, when must be called, *ib.*
 - unstamped duplicate, 683.
 - recital of lost deed, *ib.*
 - old copy, *ib.*
 - abstract, *ib.*
- ancient documents,
 - copy in chartulary of abbey,
- deed enrolled under 27 Hen. 8.
 - copy of enrolment, 686.
- deed enrolled for safe custody,
 - copy, evidence only against party acknowledging deed, 688, 690.
- letters patent,
 - exemplified copy, 689.

SECRETARY OF STATE,

official correspondence of, privileged from disclosure, 193.

SEDUCTION,

character of daughter, relevant inquiry in action for, 488.

SEISIN,

presumption of, from possession, 472.

SEIZURE,

condemnation in Exchequer conclusive as to legality of, 551.

or by commissioners of excise, 553.

acquittal, whether conclusive as to illegality of, 552.

SENTENCE. And see *Judgment*.

of foreign court, 532.

of ecclesiastical court, 543.

how proved, 622.

SEPARATIST,

affirmation of, has same effect as oath, 13.

SERVANT. See *Agent*.

competent witness for master generally, 141.

but incompetent, when, 101.

SERVICE,

of attorney's bill, may be proved by entry made by deceased clerk, 339.

of notice to quit deceased attorney, *ib*.

of notice to produce

on whom, 665.

within what time of trial, *ib*.

of subpoena, 781.

SETTLEMENT,

how far determined by judgment of quarter sessions, 529.

where order of removal quashed, *ib*.

where affirmed, 531.

SHERIFF. See *Escape*, *Undersheriff*.

admissions of undersheriff, evidence against, when, 406.

of bailiff, 407.

inquisitions taken by, without writ, inadmissible, 584.

SHIP. And see *tit. Policy*, *Owner*, *Captain*.

unseaworthiness, presumption of, arises, when, 461.

opinion of ship-builder, admissible as to, 901.

loss of, when presumed, 469.

ownership of, presumed from possession, when, 472.

capture of, how proved, 598.

registration of, not evidence for owner, 597.

when evidence against him, *ib*.

conclusive against strangers, *ib*.

how proved, 643.

SLANDER,

proof of profession, &c., when dispensed with; by admission, 371.

other words admissible, in proof of animus, 497.
on trial of, plaintiff begins, 836.

proof of material part of words alleged, sufficient, 848.

SOLICITOR. See *Attorney, and Privileged Communication.*

SOLVIT AD DIEM,

on plea of, payment before day supports issue, 846.
or payment to third person, if authorized, *ib.*

SON ASSAULT DEMESNE,

issue on a plea of, when considered as proved, 847.
when day immaterial, 862.

SPECIAL CASE,

evidence of facts stated, 410.

SPECIAL FINDING,

judgment according to, when allowed, 874.
when not, 873.

SPIES,

communications of, how far privileged from disclosure, 189.

STAMP,

additional, not necessary on release to witness, re-executed at trial.

attorney privileged from answering as to whether client's deed stamped, 188.

on probate, not evidence of assets received, 389.

whether of future assets, *ib. n. (6.)*

production of document in order to affix, when compelled, 821.

how order enforced, 825.

unstamped receipt allowable to refresh witness's memory, 894.

STATUTE,

when presumed, 474.

statement in preamble admissible, 589.

public and private, how distinguished, 609.

private, how proved, 611.

where public clause, *ib.*

where king's printer's copy declared evidence, *ib.*

where printed copy erroneous, *ib.*

STATUTE OF FRAUDS. See *tit. Contract, Parol Evidence.*

STEALING. See *tit. Larceny.*

STEWARD,

of manor competent to prove custom as to fine, though entitled to fee, 141.

not privileged from answering as to affairs of employer, 176.
deceased, entries by, evidence of payment, when, 312.

of ownership, 326, 415.

See Index a

STOCK,

transfer of, proved by bank books, 597.

STOLEN GOODS,

party entitled to restitution of, competent witness for prosecution, 129.

SUB LESSEE,

of defendant, in action for mismanagement of farm, competent for defendant, 120.

SUBPCENA,

effect of, 780.

service of, 781.

remedies for disobedience to, 785.

in criminal cases, 786.

SUBSTANCE

of issue, when considered as proved,

freehold in close, in trespass, 846.

plea of *solvit ad diem*, *ib.*

covenant for waste, *ib.*

action for breach of duty or contract, *ib.*

total loss on policy, 847.

plea of son assault demesne, *ib.*

molliter manus, *ib.*

moderate correction of apprentice, *ib.*

action against sheriff for escape, *ib.*

amount of claim, in assumpsit and debt, *ib.*

words spoken, in slander, 848.

lease, in replevin, *ib.*

assault of officer of district, *ib.*

demand, after tender, 849.

in criminal cases,

publication of libel, 849.

false pretences, *ib.*

petit treason, *ib.*

burglary, *ib.*

robbery, *ib.*

murder, 850.

manner of killing, *ib.*

indictment as principal, *ib.*

indictment as accessory, 851.

murder of officer in execution of process, 851.

SUBSCRIBING WITNESS. See tit. *Attesting Witness.*

SURETY

in replevin, incompetent as witness, 80.

rendered competent how, *ib.*

admission of principal not evidence against, 411.

SURGEON,

statement of symptoms by patient to, admissible, 203.

SURRENDER OF COPYHOLDS,

how proved, 639.

SURRENDER OF TERM,

when presumed, 476.

SURROGATE,

acting by, considered proof of appointment, 453.

SURVEY,

private, evidence by way of admission, when, 415.

ecclesiastical, effect of as evidence, 586.

SURVIVORSHIP,

presumption as to, 469.

TAXATION

of Pope Nicholas, 586.

TENANCY,

contract as to, when in writing must be produced, 442.

when variance in proof fatal, 853.

TENANT

incompetent as witness for defendant in ejectment, 78.

on indictment for forcible entry under 21 J. 1, c. 25, or

8 H. 6, c. 9, incompetent for prosecution, 66.

at common law competent, 130.

estopped from disputing landlord's title, when, 382.

not by mere attornment, *ib.*

by payment of rent, *ib.*

for life, judgment against, not binding on reversioner, 519.

TENDER

proved by entry of deceased clerk, 327.

demand after, how allegation supported, 849.

TENOR,

effect of setting out, in matter of record, 859.

in deed, 858.

TERM,

outstanding, surrender of, when presumed, 476.

TERRIER,

what, 602.

not admissible, unless signed by churchwarden or inhabitant,
603.

signature of incumbent not necessary, *ib.*

modus cannot be established by, alone, *ib.*

admissible between vicar and impropriator, 604.

proper custody of, 644.

TESTATOR,

judgment against, binding on executor, 517.

THEFT. See *Larceny and Burglary*.**THREATENING LETTER,**

other letters of prisoner admissible in prosecution for, 497.

TIME

of birth, &c. matter of pedigree, 225.

averment of in record, not conclusive, 507.

variance in proof of, when not material,
861.

TITHES. See tit. *Modus, Parson, Vicar*.

admissions by former occupiers, evidence as to, 414.

judgments as to, not admissible unless of same lands, 513.

TITLE,

matters of, in knowledge of attorney, privileged, 181.

deeds of client, attorney privileged from producing, 185, n. (3).

TOAST,

treasonable, 214.

TOLL,

public, party disputing, competent witness to disprove, 139.

TOMBSTONE,

copy of inscription on, evidence in matters of pedigree, 233.

when necessary to shew by whom made, 243.

TORT,

rule as to variance in actions of, 852.

TRADING,

letters and declarations of bankrupt, evidence of, when, 208.

TRANSFER,

of stock, proved by bank books, 597.

TREATIES,

for compromise, admissions during. See tit. *Compromise*.

TREASON,

conviction of, incapacitates from giving evidence, 17.

on charge of, wife incompetent against husband, 161.

letters, declarations, &c. of co-conspirator, when admissible
in, 210. And see *Conspiracy*.

confession of, admissible, if made by two witnesses, 435.

one witness sufficient, where overt act attempt on king's
life, 436.

or if confession confirmatory of other evidence, *ib*.

or relating to collateral facts, *ib*.

presumptions in cases of, 478.

overt acts not laid in indictment, inadmissible, when, 492.

when admissible, 493.

TREASON—*continued*.

acts and declarations of prisoner, when admissible in his favour, 499.

treasonable writings, on trial for, notice to produce unnecessary, 669.

TREASON, PETIT,

proof of marriage, when dispensed with by admission, 377, n. (4).

on charge of, prisoner may be convicted of murder, 849.

TRESPASS,

defendant in, who has suffered judgment by default, rendered competent witness for co-defendant, 53.

quære, where damages against him remain unassessed, 53, and n. (3.)

incompetent against co-defendant, 54.

trespasser, named in declaration, but not made defendant, competent as witness, when, 60.

when not (*ib.*) and n. (2.)

recovery in, bar to trover for same taking, 509.

substance of issue in, on plea of freehold, considered proved, when, 846.

amendment in, when allowed at nisi prius, 872.

when not, 873.

TRIAL,

when put off to allow time for religious instruction of witness, 6, n. (2).

to enable prisoner, who has received implied promise of pardon, to apply for it, 27.

on account of absence of witness, 800.

TROVER,

defendant, who has suffered judgment by default in, competent as witness for co-defendant, 52.

party claiming goods in question as his own, competent for defendant, 103, 121.

recovery in bar to action for money received from sale of same goods, 509.

in action of, for writings, notice to produce unnecessary, 668.

TRUSTEE,

party to suit, incompetent as witness, 48.

parochial, incompetent witness, 49, *sed vide* n. (2.)

competent, if not beneficially interested or liable to costs, 119.

of turnpike act, competent witness, 135.

of wife, husband incompetent witness to prove property, 159.

TRUSTEE—continued.

conveyance by, to *cestui que trust*, when presumed, 476.
 of charity, sentence of deprivation by, conclusive, 554.

UNDER-SHERIFF,

admissions of, evidence against sheriff, when, 406.
 appointment of, presumed from acting, 453.
 possession of document by, considered as possession by sheriff,
 664.

UNDERSTANDING,

defect of, renders witness incompetent, 4.

UNDERTAKING,

to release, renders witness competent, 155.
 to appear, given by attorney, operates as admission, 369.

UNDERWRITER,

party to consolidation rule, incompetent as witness, 84.
 who has paid loss to plaintiff, under agreement to repay if
 suit fail, incompetent, 84, 146.
 to same policy, competent witness for defendant, 115.
 opinion of, as to tendency of circumstances to increase pre-
 mium, inadmissible, 899.
 but admissible, as to duty of broker in effecting policy,
 900.

USAGE,

modern, presumption arising from, how far conclusive, 461.
 effect of, as to incorporeal rights, by 2 & 3 W. 4, c. 71, 473.
 bye-law, when presumed from, 478.
 when admissible in construction of ancient instrument, 745.
 or old act of parliament, *ib. n.* (4).
 private deed, 747.
 mercantile contracts, 739.
 policy of insurance, 738, *n.* (4).
 contracts by particular classes, 738.
 and see *Custom*.

USE AND OCCUPATION,

proof of written contract, if any, necessary to recover for, 443.

USURY,

borrower, competent witness for plaintiff in action for penalties,
 116.
 attorney not privileged from proving, in action of debt,
 on plea of, judgment in action for penalties admissible, 514.

UTTERING,

of forged notes, or counterfeit money, proved by previous
 uttering, 494.
 by subsequent uttering, when, 496.

VALOR BENEFICIORUM

of Pope Nicholas, 586. .

of 26 Hen. 8, *ib.*

parliamentary, 587.

VALUATION,

ministers accounts of monasteries, admissible as to endowments,
602.

VARIANCE. And see tit. *Substance.*

between averment and proof

definition of, 845.

when considered material, 851.

in action on bill of exchange, *ib.*, 854.

in tort, 852.

matter of description, *ib.*

in contract or prescription, *ib.*

in matter of inducement, 853.

where averment essential to cause of action, *ib.*

where not, *ib.*

where averment essential to charge against prisoner, 855.

where not, 854.

in statement of contract, 855.

in statement of prescription, 857.

proof of more ample right, *ib.*

in statement of possessory right, 858.

in setting out of deed, *ib.*

in statement of substance of deed, 859.

in setting out tenor of record, 859.

in stating substance of record, 860.

direction of bill in Chancery, *ib.*

date of acquittal, *ib.*

names of justices, 861.

date of judgment, *ib.*

in time stated

on indictment, 862.

in action, *ib.*

assault, *ib.*

in name of place laid,

when fatal, 862.

when not, 863.

name of repute, *ib.*

matter of venue, 864.

in criminal matters, *ib.*

amendment of, at *nisi prius*, when allowed under 9 Geo. 4,

c. 15, 866.

judges' decision not subject to review, 874.

VARIANCE—*continued.*

- under 3 & 4 W. 4, c. 42, 867.
- description of place, in ejectment, 871.
- of statement of warranty, *ib.*
- of statement of contract, *ib.*
- of description of place in trespass, 872.
- when not allowed
 - to alter nature of title, in ejectment, 873.
 - to alter extent of justification, in trespass, *ib.*
 - to alter award of process, *ib.*
 - to strike out name of defendant, *ib.*
 - to increase damages laid, *ib.*
- judgment according to special finding, when allowed, 874.
- when not, 875.
- decision of judge as to, whether reviewable, *ib.*

VENDOR

- competent, to prove that he had no property in thing sold, 42.
- with warranty, incompetent to prove his title, 102.
- without warranty, competent, 120.
- who has made double conveyance to plaintiff and defendant, competent for defendant, 120.

VERDICT. And see *Judgment.*

- separate, when allowed,
 - on plea of bankruptcy, so as to render bankrupt competent for co-defendant, 56, 58.
 - in actions of tort, so as to render defendant competent for co-defendant, 58.
 - in criminal prosecutions, 69.
- admissible in proof of public right, when, 263.
- when not, 264.
- cannot be given in evidence without judgment, 618.

VESTRY BOOK,

- for what purposes admissible, 600.

VESTRY CLERK,

- appointment of, presumed from acting, 453.

VICAR,

- entry by deceased vicar, as to ecclesiastical dues, admissible for successor, 322.
- but must admit payment, 323.
- admission of lessee of tithes, evidence against, 413.
- admission by, evidence against successor, *ib.*
- judgment for, evidence for successor, 518.

VIDELICIT,

- omission of, when averment rendered material by, 860, n. *

VISITOR

- of college, sentence of, generally conclusive, 554.
 - may be impeached for excess of jurisdiction, *ib.*
 - but not for irregularity, *ib.* n. (4.)

VOIR DIRE,

- objection to competency of witness, made on, 149.
 - removed on, *ib.*
- rule as to secondary evidence, not applicable to, *ib.* 454.
- examination on, 884.

WAGER,

- witness to, betting on same event, not incompetent, 145.
- on conviction, does not incapacitate witness, 147.

WARRANT,

- what sufficient description of, in indictment for murder of officer, 857.

WARRANTY

- of neutrality in policy, judgment of admiralty as to, conclusive, 533.
- meaning of, parol evidence of custom of merchants, admissible, 767.
- in action on, averment of knowledge unnecessary, 854.
 - what considered as variance, 856.
 - when warranty sufficiently set out, 856.
- statement of, when allowed to be amended at *nisi prius*, 871.

WASTE,

- in covenant for, what acts insufficient to prove issue, 846.
- in action of, proof of injury to extent of allegation unnecessary, 847.

WAY. See *Highway*.

- right of, how far to be presumed from user, 473.

WHARFINGER,

- acknowledgment of title by, conclusive against, when, 384.

WIDOW

- incompetent to prove admission of deceased husband, 168.

WIFE. See *Husband and Wife*.

WILL,

- erasure in, whether attorney bound to speak to, 187 and 188, n. (1.)
- execution of, may be proved by one of several subscribing witnesses, 438.
- how proved to affect personalty, 645.
 - where probate lost, *ib.*

WILL—*continued.*

- to prove relationship, 645.
- ledger book admissible, 646.
- more than thirty years old, how proved, 652.
- how thirty years computed, *ib.*
- admissibility of parol evidence, in construction of. See *Parol Evidence.*

WITNESS,

- competency and incompetency of, 82.
- grounds of incompetency,
 1. Want of understanding, 4.
 - insane, idiots, lunatics, 4.
 - deaf and dumb, competent, when, 4.
 - how examined, 4.
 - children, competent, when, 5.
 - when trial postponed, 6.
 - evidence of, not required to be corroborated, 6.
 - And see *respective Titles.*
 2. Want of religious belief, 7.
 - general rule and its reason, 7 to 11.
 - atheists incompetent, 11.
 - infidels and heathens competent, when, 11, and n. (6).
 - Jews, 10 and 11.
 - how competency to be ascertained, 12.
 - excommunicated persons competent, 13.
 - Quakers, Moravians, and Separatists, 13.
 3. Infamy of character. See *tit. Infamy.*
 - incompetency from, how created, 14.
 - principle of the rule, 15.
 - soundness of principle considered, 15, and n. (3).
 - what offences incapacitate, 17.
 - extent and effect of disability, 19.
 - proof of, 19.
 - competency how restored, 20.
 - accomplice competent, 25. See *tit. Accomplice.*
 - informer competent, 39. See *tit. Informer.*
 - witness alleging his own dishonesty not incompetent, 40, 42.
 - nor witness invalidating instrument signed, circulated, or witnessed by himself, 41.
 - nor though his evidence be at variance with a previous statement on oath, 42.
 4. Interest,
 - general rule, its policy considered, 43, *et seq.*

WITNESS—*continued.*

interest of,

interest must be direct,

party to suit incompetent generally, 46.

party to civil suit, 47.

incompetent if interested in event of cause, 47.

or in the costs, 48.

considered free from interest, when, 49.

incompetent at commencement of suit, when rendered competent by subsequent proceedings,

by judgment by default against him,

in actions on *contract* generally remains incompetent, 50.

but rendered competent *against* co-defendant, when, 52.

in actions on *tort* rendered competent for co-defendant, 52.

sed quare if rule universally applicable, 53 (n).

remains incompetent *against* co-defendant, 54, (n).

except in ejectment, when, 55.

by *nolle prosequi*,

rendered competent for co-defendant, when, 55.

by separate verdict, rendered competent, 58.

when separate verdict allowed, 58.

name being struck out of record renders competent, 60.

when allowed to be done, 61.

person named in declaration as wrong doer, but not made defendant competent, when, 60.

when not, 60, and n. (2).

party to criminal proceedings,

prosecutor and party injured, generally competent, 61.

why, 62, *et seq.*

when not, 64, (n.)

incompetent as immediately interested in conviction, when, 66.

competent, although immediately interested, when, 67.

defendant generally incompetent, 68.

rendered competent after indictment when

by *nolle prosequi*, 69.

by plea in abatement and judgment in his favor, 69.

WITNESS—*continued.*

interest of,

by separate verdict, when, 69.

remains incompetent after suffering judgment by default, 70.

incompetency of husband or wife of party. See tit. *Husband and Wife.*

persons not parties to the suit,

general rule as to, stated, 71.

incompetent, before stat. 3 & 4 W. 4, c. 42, if directly or indirectly interested in the event of the suit, 74.

what constituted indirect interest, 76.

now, competent unless directly interested, 76, *et seq.*, 96.

persons whose interest is apparent from the proceedings in the suit, 79.

husband and wife, 80.

bail, *ib.*

rendered competent, how, *ib.*

depositor of money in lieu of bail, *ib.*

surety in replevin bond, *ib.*

but how rendered competent, *ib.*

persons whose interest is not apparent from the proceedings, 82.

competency always presumed till contrary shewn, *ib.*

amount of interest immaterial, *ib.*

in the subject of suit, *ib.*

or in the costs, *ib.*

balance of interest, 83.

preponderating interest, *ib.*

interest in personal actions,

policy, party beneficially interested in, *ib.*

consolidation rule, party to, 84.

party paying plaintiff's loss, on undertaking for repayment if suit fail, *ib.*

partner and co-contractor, 85.

principal debtor, *ib.*

co-obligor, 86.

residuary legatee to, *ib.*

next of kin, 87.

bankrupt, *ib.*

to increase or prevent diminution of fund, *ib.*

how rendered competent, *ib.*

to support or defeat fiat, 88, n. (2.)

WITNESS—*continued.*

- interest of,
 - insolvent debtor
 - to increase fund, even after release of surplus, 90.
 - creditor of bankrupt
 - to increase fund, *ib.*
 - or support fiat, *ib.*
 - of insolvent
 - to increase fund, *ib.*
- interest connected with real property,
 - tenant in possession, 78.
 - party holding agreement for lease of lands when recovered, 91.
 - remainder man, *ib.*
 - tenant by the curtesy, *ib.*
 - devisee, 92.
 - members of corporation, 93.
 - owners of rateable property, *ib.*
 - rated inhabitant, 94.
 - party under whom defendant makes cognizance, 95.
- interest arising from liability over, where verdict would release witness. Cases considered, 95, *et seq.*
 - effect of, 3 & 4 W. 4, c. 42, *ib.*
 - servant of plaintiff, 100.
 - captain of ship, *ib.* n. (3.)
 - owner of ship, *ib.*
 - driver of stage coach, 101.
 - former vendor of estate with warranty, 102.
 - vendor of horse with warranty, *ib.*
 - accommodation bill, party for whose benefit given, 104.
 - agent employed to get bill discounted, 105.
- contrariety of construction of 3 & 4 W. 4, c. 42.
 - cases in which the statute has been held to apply to a liability over, 109.
 - opposite cases, 111.
 - distinction in the application of the statute to witnesses for plaintiff and defendant, 112.
- what is not such an interest as will disqualify,
 - wishes or expectation, 114.
- witness in same situation, *ib.*
 - co-trespasser, *ib.*
 - underwriter to same policy, 115.
 - in criminal proceedings, *ib.*

WITNESS—*continued.*

interest of,

on *quo warranto*, 115.

expected influence of verdict in proceedings by or
against witness, 116.

borrower in action for penalties for usury, 116.

possibility of action

surety to administration bond, 117.

executor *de son tort*, *ib.*

specific legatee, *ib.*

annuitant under will, 118.

creditor of testator or intestate, *ib.*

creditor of bankrupt, having assigned his debt,
119.

official assignee, *ib.*

tenant in possession of property injured, 120.

vendor without warranty, *ib.*

sub-leasee, *ib.* *Quære n.* (4.)

under plea of *lib. ten.* former owner who has
made double conveyances, *ib.*

policy, captain, part owner, competent as to
destination, 120.

party claiming property in subject of suit, 121.
other cases, *ib.*

imaginary interest,

honorary obligation to indemnify, 122.

interest on both sides,

party who has received the money for defend-
ant, 123.

party who has made inconsistent demises, 124.

joint contractors, *ib.*

co-obligor, *ib.*

joint maker of note, *ib.*

partner of defendant, for plaintiff, *ib.*

joint maker of note, for plaintiff, 125.

drawer of bill, for either party, *ib.*

indorser of bill or note, for either party, *ib.*

accommodation indorser, for plaintiff, 126.

maker of note, for both parties, in action by
indorsee v. indorser, 127.

exceptions to the rule of incompetency from interest,

principle on which exceptions founded, 128.

statutory exceptions,

stolen goods, owner of, 129.

WITNESS—*continued.*

interest of,

statutory rewards on conviction, 131.

statutory pardon, *ib.*

indemnity on conviction (bribery), 131, and n. (5.)

informer, on statute against exporting machinery,
132.

inhabitant of county, &c. on indictment, for not
repairing bridge, &c. 133.

„ „ hundred „ under stat. Winton,

„ „ „ for riotous assembly,
133.

„ „ parish, in action against overseer, &c.
for misspending parish
funds, 134.

where penalty to go to poor,
when, *ib.*

in summary convictions under
7 & 8 G. 4, c. 29 & 30, *ib.*

in indictment under general
highway act, *ib.*

under general
turnpike act,
135.

trustee or commissioner, under turnpike act, *ib.*

rated or rateable inhabitant, in matters relating to
rates or cesses, *ib.*

what deemed to relate to rates and cesses, 136.

what not, 137.

contradictory decisions considered, 138, and
n. (3.)

officers of customs, entitled to penalty, 139.

exceptions at common law,

from necessity, *ib.*

where no other evidence, *ib.*

right affecting the public, party disputing, *ib.*

agents, in the course of their employment, 140.

factors and brokers, *ib.*

but where the only transaction exception
does not apply, 141.

servants and carriers, *ib.*

steward of a manor,

but agents not competent in actions for negligence,
141.

nor where acting beyond authority, 142.

WITNESS—*continued*.

interest of,

other exceptions,

parties to suit in equity, where issue directed, 142.

action for malicious prosecution, evidence of defendant before grand jury, 143.

prosecutor, on indictment removed by *certiorari*, 143.

witness offering to release his interest, 144.

refusing to accept release of liability, *ib*.

legatee refusing to receive payment of legacy, 144, and (5).

party acquiring interest, in order to render himself incompetent, 145.

party acquiring interest, since cause of action, *ib*.

but where no fraud, incompetent, 146.

prosecutor laying wager on conviction, 147.

objection as to interest, when to be made.

during examination, 148.

after cross-examination, *ib*.

not after witness left the box, *ib*.

depositions on interrogatories (objection not tenable at trial), 149.

how raised,

on *voire dire*,

rule as to best evidence, not applicable, 149.

when objection removed on *voire dire*, *ib*.

when not, 150, *sed q.* 151.

how removed,

release,

considered to relate back to commencement of interest, 151, and n. *

when not, *ib*.

bars inchoate right of action, *ib*.

renders competent, when, and when not, *ib*.

legatee, 151.

acceptor of bill, *ib*.

drawer of accommodation bill, 152.

next of kin, *ib*.

guardian, 153.

co-obligee, *ib*.

co-obligor, *ib*.

joint contractor, *ib*.

partner, *ib*.

part owner, 154.

residuary legatee, *ib*.

WITNESS—*continued.*

interest of,

stamp of release, 154.

other methods,

undertaking to release, 155.

disfranchisement of corporator, *ib.*

deposit of penalty by bail or obligor for costs,
156.

release refused, *ib.*

privilege of parties to suit from being examined,
grounds of rule, 157.

rated inhabitants, 158.

ejectment, one of several lessors, *ib.*

privilege, personal,

co-plaintiff or defendant, examined by consent, *ib.*

incompetency of husband and wife. See *Husband and Wife.*

exclusion of matters of professional confidence. See tit.
Attorney, Privileged Communication.

deceased, in what cases his testimony on former kind admis-
sible, 353.

attesting, proof of deed, &c. by, when dispensed with. See tit.
Writing, Attesting Witness.

illness of. See tit. *Deposition.*

attendance of, to give evidence on trial,

under subpoena, 779.

under subpoena *duces tecum*, *ib.*

effect of writ, 780.

expenses of, under rule H. 2, W. 4, *ib.*

service of subpoena on, 781.

when, 782.

privilege of, from arrest, *ib.*

in what cases, 783.

for what time, 782.

in custody of sheriff,

prisoner of war,

tender of expenses to, 784.

when unnecessary, 785.

witness residing abroad, *ib.*

remedies against, for non-attendance,

attachment, 785.

non-attendance must be wilful, 786.

evidence material, *ib.*

action for damages, 786.

action under 5 Eliz. *ib.*

in criminal cases,

by subpoena, 786.

WITNESS—*continued.*

- examination of,
 - by recognizance, 786.
 - where witness in the united kingdom, but out of jurisdiction, 787.
 - expenses must be tendered, 792.
 - allowance of expenses to, 788.
 - tender of expenses not necessary, 791.
- before commissioners of bankrupt, 793.
- before justices, *ib.*
- before courts martial, *ib.*
- before commissioners of inclosure, *ib.*
- before arbitrator, 794.
- examination of, on interrogatories,
 - residing in British colonies and plantations, 797.
 - in other cases, *ib.*
 - when depositions admissible, 799.
- absence of, ground for putting off trial, by defendant, when, 800.
 - not by plaintiff, *ib.*
 - how and when application to be made, 801.
- examination of, at *nisi prius*, how conducted,
 - as to competency,
 - on *voire dire*, 884.
 - in cross-examination, 885, 149.
 - how far rule as to secondary evidence relaxed, 885.
- separate examination, when ordered, *ib.*
 - effect of disobedience of order, 886.
- leading question, what, 886.
 - when allowed,
 - in suggestion, on failure of memory, 888.
 - introductory, if not conclusive, *ib.*
 - where witness hostile, *ib.*
 - when preparatory to contradiction of former witness, 889.
- memoranda to refresh memory, 891.
 - when must be produced, 893.
 - where writing itself inadmissible, 894.
 - unstamped receipt, *ib.*
 - when allowed, though not written by witness, 895.
 - at what time memorandum must have been made, 895.

WITNESS—continued.

examination of,

copy inadmissible, 897.

when memorandum may be read to witness,
898.

evidence as to belief, when admissible, 898.

identity, *ib.*handwriting, *ib.*

opinion of witness, when admissible,

of medical men, as to state of health, 899.

how far admissible as to sanity, *ib.*

of underwriters,

as to circumstances tending to increase pre-
mium, inadmissible, *ib.*but admissible, as to what the duty of broker
in effecting policy, 900.

of ship-builders, as to seaworthiness, 901.

of engineers, *ib.*of seal engravers, as to forgery of seal, *ib.*of artists, as to genuineness of picture, *ib.*genuineness of postmark, *ib.*

inadmissible as to legal or moral obligation, 900, 901.

when a party may discredit his own witness, 901.

general evidence of bad character, inadmissible, 902.

but contradiction, as to material fact relevant to
issue, admissible, *ib.*by proof of contrary statement made by witness,
904.

cross-examination of, how conducted,

witness merely producing papers, not subject to, 908.

unless sworn, *ib.*

leading questions allowable, how far, 912.

where witness unwilling, *ib.*where willing, *ib.*

witness privileged from answering, when,

1. Where answer might subject to penalties, 913.

prosecutrix in rape as to crim. con., 914.

alleged putative father of bastard, as to that
fact, *ib.*

copier of libel, 914.

accomplice as to other offences, *ib.*

2. Where answer might subject to civil suit,

witness compellable to answer, 914.

but not party, 915.

rated inhabitant, *ib.*

WITNESS—*continued.*

cross-examination of,

3. Where answer might subject to forfeiture, 976.

4. Where answer might degrade witness's character, 916.

witness not compellable to answer, *ib.*

but question admissible, 920.

and if answered, answer conclusive, 923.

does not give opposite party right to reply, though proving new fact, 939.

unless additional evidence given, *ib.*

document proved on, when to be put in, 940.

credit of, how impeached, otherwise than by cross-examination,

by proof of general character, 923.

particular acts inadmissible, *ib.*

mode of examining, 925.

how proof rebutted, *ib.*

by proof of contrary statement, formerly made by witness, *ib.*

but witness must be previously examined on the point, 926.

and if statement in writing, it must be produced to witness, 929.

unless lost, 931.

whether witness may be asked generally as to different statement in a letter, 932.

statement must be relevant to issue, 938.

and witness may be re-examined as to other parts of statement, shewing his meaning and motives, 940.

but not as to another former statement agreeing with his evidence in chief, 944.

WORDS,

when evidence. See *tit. Hearsay.*

ambiguous, when explained by parol, 712.

material, proof of, sufficient to support slander, 848.

WORK AND LABOUR,

production of written contract, if any, necessary to recovery for, 443.

or for extras, *ib.*

WRIT,

how proved, 631.

filazer's book and copy writ inadmissible, 631.

WRIT—*continued.*

in custody of officer, inspection of, allowed, when, 805.

variance in proof of, when material, 859.

lost, when secondary evidence of, admissible, 617.

WRITING

referred to in admission receivable in explanation, 358.

need not be separately proved, 362.

notice to produce when necessary, 364.

found on prisoner, 376.

admissions by, 388.

paper written by one, and signed by another, evidence against both, 390.

exclusion of inferior evidence, in substitution for. See tit.

Secondary Evidence.

destruction or defacement of, presumption arising from, 466.

judicial effect of, in evidence, 505. See *Record, Judgment,*

Deposition, Inquisition, &c.

how proved, 609.

public, not judicial, 589. See tit. *Journal, Proclamation,*

Register, Book, Certificate, &c.

how proved, 632, 638.

proper custody of, 633.

private, execution of, how to be proved,

generally, by attesting witness, 649.

extent of the rule, *ib.*

attested notice, *ib.*

attested bill, *ib.*

admission by party, 650.

exceptions to the rule,

instrument thirty years old, 651.

extent of exception, 652.

in will, how thirty years to be computed, 652.

seal of corporation, whether within exception,

ib.

where erasure, deed must be proved, 653.

where witness known to be alive, whether he need be called, 653.

instrument produced in pursuance of notice, by party claiming under it, 655.

existence of interest may be proved *aliunde*, 656.

attesting witness not forthcoming, proof of handwriting received, when, 657.

witness dead, *ib.*

WRITING—*continued.*

- exceptions to the rule of proof,
 - blind, 657.
 - insane, *ib.*
 - infamous, *ib.*
 - abroad, *ib.*
- interest of attesting witness, effect of,
 - when interested at time of attestation and at trial, 657.
 - when interest known, before attestation, to party against whom instrument produced, *ib.*
 - when interest acquired subsequently, *ib.*
 - communicated by party producing instrument, 658.
- illness of attesting witness, *ib.*
- absence of attesting witness, *ib.*
 - due inquiry for, what amounts to, *ib.*
- fictitious attesting witness, 660.
- unauthorized attesting witness, *ib.*
- attesting witness denying signature, *ib.*
 - identity how proved, 660.
- several attesting witnesses, 661.
- effect of proof of handwriting of witness, *ib.*
 - whether identity of party to be proved, *ib.* n. (4)
- secondary evidence of, when admissible,
 - instrument in possession of party using it, 662.
 - instrument in possession of opposite party, *ib.*
 - notice to produce necessary, 662.
 - extent of rule, *ib.*
 - effect of notice, 663.
 - what evidence of possession necessary, 664.
 - possession by privies, *ib.*
 - captain, *ib.*
 - banker, *ib.*
 - undersheriff, *ib.*
 - executor, *ib.*
 - possession by independent party,
 - stakeholder, *ib.*
 - form of notice, 665.
 - service of, on whom, *ib.*
 - within what time of trial, *ib.*
 - effect of non-production, 666.
 - writings called for, but not used, 667.
 - writings inspected, 668.

WRITING—*continued.*

- time for demanding production, 668.
- notice to produce, when dispensed with, *ib.*
- notice from proceedings, *ib.*
 - trover, *ib.*
 - theft, 669.
 - treasonable paper, *ib.*
- copy considered as original, *ib.*
- inscription on banners, *ib.*
- resolutions of meeting, 670.
- paper containing form of unlawful oath, *ib.*
- possession of instrument obtained by fraud, *ib.*
- duplicate, *ib.*
- counterpart, *ib.*
- notice, 671.
- attorney's bill, *ib.*
- machine copy, *ib.*
- ship's articles, in action by seaman, *ib.*
- deed in court in possession of the other party, *ib.*
- instrument not in possession of opposite party, 673.
- or privileged from production, 674.
- instrument destroyed, *ib.*
- not found on inquiry, *ib.*
 - sufficient inquiry, what, *ib.*
 - deposit in course of duty, 674.
 - useless papers, 675.
 - expired instrument, *ib.*
 - licence, *ib.*
 - policy, *ib.*
 - information before magistrate, 676.
 - power of attorney, *ib.*
 - appointment of overseer, 677.
 - indenture of apprentice, 679.
 - paid check, 681.
- what sufficient secondary evidence of, 1.
 - examined copy, 684.
- letters, parol evidence, 681.
- copy by deceased clerk, 682, 684.
- deed, &c., attesting witness, when must be called, *ib.*
- unstamped duplicate, when admissible, 683.
- recital of lost deed, *ib.*
- old copy, *ib.*
- abstract, *ib.*
- ancient documents,
 - copy in chartulary of abbey, 685.

WRITING—*continued.*

deed inrolled under 27 Hen. 8.

copy of inrolment, 686.

deed inrolled for safe custody,

copy of inrolment, evidence only against party acknowledging deed, 688, 690.

letters patent,

exemplified copy, 689.

signature to, how proved. See tit. *Handwriting*.

parol evidence in construction of. See *Parol Evidence*.

to add to, vary, or discharge. See *ib.*

inspection of. See tit. *Inspection*.

to refresh memory of witness. See *Memorandum*.

proved on cross-examination, when to be put in, 940.

on which witness cross-examined to shew contrary statement, must be produced, 929.

unless lost, 931.

cannot be proved without previous cross-examination, 926.

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